Supreme Court of the United States

OCTOBER TERM, 1924.

No. 212.

THE DELAWARE AND HUDSON COMPANY, THE ALBANY AND SUSQUEHANNA RAILROAD COMPANY, RENSSELAER AND SARATOGA RAILROAD COMPANY, *et al.*,

Appellants,

v.

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANTS.

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ANALYTICAL TABLE OF CONTENTS.

APPENDICES:

List of Citations.

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I.

STATUS.

This is a direct appeal from a final decree (*R. 259-260*) in a suit brought to enjoin, suspend and set aside an order of the Interstate Commerce Com-

mission—*R. 15-232.* Appellants sued the United States in the District Court of the United States for the Southern District of New York, in accordance with the provisions of the Urgent Deficiency Act of October 22, 1913 (*38 Stat. 219-220, U. S. Comp. St. 1001*) and the Interstate Commerce Commission intervened—*R. 233.*

Motions to dismiss were separately entered by the United States (*R. 233*) and by the Commission (*R. 234*) and, after hearing on these motions by the statutory court (*R. 232, 235*), they were granted; appellants' motion for a preliminary injunction was denied, and a final decree, dismissing appellants' petition, was entered—*R. 259-260.*

The opinion of the District Court is printed in the Record (*R. 256-9*) and has been reported—*295 Fed. 558.*

II.

STATEMENT OF FACTS.

1. On March 28, 1923, the Interstate Commerce Commission entered an order (*R. 6, 15-232*), which fills 218 pages of the Record, purporting to set up "tentative valuations" of appellants' properties, in accordance with Section 19a (the "Valuation Act") of the Interstate Commerce Act. The first paragraph of this order is as follows:

> "It is ordered, that the following be, and they are hereby declared to be, the tentative valuations of the properties of The Delaware

and Hudson Company, The Albany and Susquehanna Railroad Company, The Rensselaer and Saratoga Railroad Company, Albany and Vermont Railroad Company, Rutland and Whitehall Railroad Company, Saratoga and Schenectady Railroad Company, Northern Coal and Iron Company, The Ticonderoga Railroad Company, The Chateaugay and Lake Placid Railway Company, and The Plattsburgh and Dannemora Railroad, as of June 30, 1916"—*R. 6, 15-6.*

2. Petitioners are all the corporations named in the foregoing (there is no Plattsburgh and Dannemora Railroad corporation—*R. 62)* and, together, make up the system of railroads operated by appellant, The Delaware and Hudson Company (*R. 16*).

3. The order referred to in paragraph 1, was served upon appellants; upon the Governors of the States of New York, Pennsylvania and Vermont, and upon New York Public Service Commission, Public Service Commission of Pennsylvania, Vermont Public Service Commission, and National Association of Railway and Utilities Commissioners (*R. 6, 13-4*). At the same time, the parties thus served were directed, by the Commission, as follows:

"You are required to file with the Commission at its office in Washington on or before thirty (30) days from the 12th day of April, 1923, any protest which you may desire to make to such valuation, or to any part of such valuation"—*R. 15.*

4. A protest (*R. 242-256*) was filed on behalf of all appellants within the time limited as above (*R. 235*) and is a part of this Record (*R. 235, 242-256*), but—

5. Owing to the defective character of the order, appellants were not able to protect their rights by an adequate and proper and sufficiently full and detailed protest—*Petition XIX, R. 12.*

5. In making the order referred to in paragraph 1 the Commission refused and omitted to investigate, ascertain and report many of the facts required by the statute (*Section 19a of the Interstate Commerce Act*) to be investigated, ascertained and reported in all "tentative valuations." Among these facts are the following:

a. Original cost to date of property other than land, except as such original cost is shown by records—*Petition VI, R. 6;*

b. Original cost of lands, rights-of-way and terminals, except as such original cost is shown by records—*Petition VII, R. 6-7;*

c. Other values and elements of value—*Petition IX, R. 7;*

d. Original cost and present value of non-carrier property—*Petition X, R. 7;*

e. Value of property or properties of appellants, or any of them, as an whole—*Petition XI, R. 8;*

f. Value of property or properties of appellants, or any of them, as an whole, in the

several States in which located—*Petition XII, R. 8.*

6. In making the order referred to in paragraph 1 the Commission refused and omitted to investigate, ascertain or report concerning property used by appellant The Delaware and Hudson Company, for its purposes as a common carrier, and the use of which is essential to such purposes. Among the properties so omitted are:

a. A double-tracked railroad, 35.01 miles in length, between Carbondale, Pennsylvania, and Jefferson Junction, Pennsylvania—*Petition XIII, R. 8;*

b. The several railway properties indicated in paragraph XIV of appellants' petition—*R. 8-9.*

7. In making the order referred to in paragraph 1, the Commission refused to apply to its inventories, which were all made as of June 30, 1916, the prices existing and current on that date but applied and used prices of an undefined period or periods, such period and all such periods closing not later than June 30, 1914—*Petition XV, R. 9.*

8. In making the order referred to in paragraph 1, the Commission omitted to report the following:

a. Analyses of the methods employed—*Petition VIII, R. 7;*

b. Reasons for differences between the respective cost values or between these cost values and other values—*Petition IX, R. 7.*

9. In making the order referred to in paragraph 1, the Commission refused and omitted to investigate, ascertain or report the amount of working capital actually used by appellants, or any of them, for the purposes of a common carrier—*Petition XVI, R. 9-10.*

III.

QUESTIONS IN ISSUE.

Appellants contend that, upon the foregoing facts, the order of the Interstate Commerce Commission, entered on March 28, 1923 (*R. 6, 15-232*), is not a "tentative valuation," within the statutory definition contained in Section 19a of the Interstate Commerce Act; that they would be substantially and irreparably injured if that order should stand as though it were a "tentative valution" conforming with the definition and process of the Valuation Act (*Section 19a*), and that they are therefore entitled to have the order in issue enjoined, suspended and set aside in this proceeding.

Section 19a, commonly called "the Valuation Act," to the authority of which the Interstate Commerce Commission refers the order of March 28, 1923, was printed in full in appellants' petition and appears in the Record—*R. 2-6:* See, also, *37 Stat. 701; 41 Stat. 493; 42 Stat. 624; U. S. Comp. St. 8591.*

IV.

SPECIFICATIONS OF ERROR.

The assignments of error appear in the Record, on pages 261-3. Summarized, they include suggestions of the following specific errors:

1. Dismissal of the petition.

2. Denial of a preliminary injunction.

3. Holding that the order of March 28, 1923, constitutes a sufficient "tentative valuation," within the statutory definition.

4. Holding that the Commission is not required to report original cost to date of property other than land in each "tentative valuation."

5. Holding that the Commission is not required to report original cost of all lands, rights of way and terminals in each "tentative valuation."

6. Holding that the Commission is not required to report other values and elements of value in each "tentative valuation."

7. Holding that the Commission is not required to report the several analyses specified in the Valuation Act in each "tentative valuation."

8. Holding that the Commission is not required to report the original cost and present

value of all non-carrier property in each "tentative valuation."

9. Holding that the Commission is not required to report the value of the property of each carrier as an whole in each "tentative valuation."

10. Holding that the Commission is not required to report the value of the property in each State in each "tentative valuation."

11. Holding that the Commission is not required to include in the "tentative valuation" of appellant The Delaware and Hudson Company, the value of 35.01 miles of its railway, between Carbondale and Jefferson Junction, Pennsylvania, and that the Commission may exclude from the "tentative valuation" other railway property and properties used for common carrier purposes by appellants.

12. Holding that the Commission is not required to consider the prices existing and current on the valuation date in arriving at any "tentative valuation."

13. Holding that the Commission is not required to ascertain the actual amount of working capital in use for common carrier purposes on the valuation date and include such working capital in each "tentative valuation."

14. Holding that appellants, and each of them, were not injured by the order of March 28, 1923.

V.

ARGUMENT.

Four propositions will be presented and discussed, as follows:

1. The order of March 28, 1923, does not comply with the Valuation Act.

2. The Interstate Commerce Commission having refused and omitted to comply with the Valuation Act, its order of March 28, 1923, is illegal and void and cannot take the place of a lawful "tentative valuation" in the further process of valuation of appellants' properties which is prescribed by the law.

3. Appellants would be substantially injured if the order of March 28, 1923, should be permitted to operate as a "tentative valuation" in the further process prescribed by the Valuation Act.

4. This is a suitable proceeding in which appellants are entitled to relief against the order of March 28, 1923.

The foregoing propositions will be considered in their order.

FIRST.

The order of March 28, 1923, does not comply with the Valuation Act.

Failure to comply with the law, *i. e.*, the Valuation Act, is admitted by the Record on Appeal.

Such failure, amounting to refusal to attempt or perform or report things which the statutes specifically commands shall be performed and reported, is alleged in appellants' petition in respect of numerous requirements of the law.

Appellants' petition alleges, not merely omissions and neglect to comply with the law, but numerous specific *refusals* to do and to report the things which the law specifies (for such *refusals* and omissions, see paragraphs VI, VII, IX, X, XI, XII, XIII, XIV, XV, XVI, *R. 6-10;* for *another omission,* see paragraph VIII, *R.* 7).

These well-pleaded facts are admitted by the motions to dismiss, filed, respectively, by the United States (*R. 233*) and the Commission (*R. 234*)—*The Chicago Junction Case, Baltimore and Ohio v. United States, 264 U. S. 258, 262-3; Detroit United Railway v. Detroit, 248 U. S. 429, 431; Oklahoma Gas Company v. Russell, 261 U. S. 290, 293.*

As the statute plainly and in specific terms requires the things which the Commission refused, there is before this Court a record that *admits* numerous violations of the law from which all authority to make the order of March 28, 1923, must be derived.

As this court said in *Kansas City Southern v. Interstate Commerce Commission 252 U. S. 178,* a former case involving action of the Interstate Commerce Commission under the Valuation Act:

> "* * * Congress indisputably had the authority to impose upon the Commission the

duty (duties) in question • • •" *252 U. S. 178, 188.*

It seems necessary to conclude, therefore, that in this instance, as in that then before the Court, the Commission misconceived its relation to the subject. The late Mr. Chief Justice White, for the Court, then said:

> "We are of opinion, however, that, considering the face of the statute and the reasoning of the Commission, it results that the conclusion of the Commission was erroneous, an error which was exclusively caused by a mistaken conception by the Commission of its relation to the subject, resulting in an unconscious disregard on its part of the power of Congress and an unwitting assumption by the Commission of authority which it did not possess." *252 U. S. 178, 187-8.*

In the case at bar, the Commission has, by its own admission, attempted to exercise, by its order of March 28, 1923, the "general power which the Act of Congress gave," *i. e.*, the power to make a "tentative valuation," but in the very act of doing so, has again committed the error of "disregarding the essential conditions imposed by Congress upon its exercise." Such a situation having appeared in the *Kansas City Southern Case, supra*, the Commission was required, in pursuance of the order of this Court, to correct its error, the conclusion of law being stated, in the opinion, as follows:

> "Finally, even if it be further conceded that the subject-matter of the valuations in ques-

tion which the Act of Congress expressly directed to be made necessarily opened a wide range of proof and called for the exercise of close scrutiny and of scrupulous analysis in its consideration and application, such assumption, we are of opinion, affords no basis for *refusing to enforce the Act of Congress, or what is equivalent thereto, of exerting the general power which the Act of Congress gave, and at the same time disregarding the essential conditions imposed by Congress upon its exercise*" —*252 U. S. 178, 188*—Italics ours.

SECOND.

The Interstate Commerce Commission having refused and omitted to comply with the Valuation Act, its order of March 28, 1923, is illegal and void and cannot take the place of a lawful "tentative valuation" in the further process of valuation of appellants' properties which is prescribed by the law.

The Valuation Act provides for two distinct and separate stages in a carefully defined process leading to the determination, by the Commission, of the value of all the property of each carrier subject to the Interstate Commerce Act—*Paragraph (a), R. 2.* The first of these stages is concluded by the emergence of a "tentative valuation," which, thereupon, becomes the foundation of all subsequent proceedings, such subsequent proceedings based upon the "tentative valuation" constituting the second stage in the statutory process.

The term "tentative valuation" is closely defined by the statute (*Section 19a; paragraphs (a), (b), (c), (d), (e), and (f), including sub-paragraphs, First, Second, Third, Fourth and Fifth, R. 2-4*), the first five paragraphs leading to the declaration that the results obtained in compliance therewith "shall be tentative valuations"—*paragraph (f), R. 4.* The last cited paragraph so clearly indicates the purpose of Congress to require substantial compliance with the prescribed process and to define and prescribe what shall constitute a "tentative valuation" that it is here repeated:

> (f) Upon the completion of the valuation herein provided for the Commission shall thereafter *in like manner* keep itself informed of all extensions and improvements or other changes in the condition and value of the property of all common carriers, and shall ascertain the value thereof, and shall from time to time, revise and correct its valuations, showing such revision and correction classified and as a whole and separately in each of the several States and Territories and in the District of Columbia, *which valuation, both original and corrected, shall be tentative valuations* and shall be reported to Congress at the beginning of each session"—*R. 4*, Italics ours.

Paragraph (f) is followed by paragraph (g) consisting of but forty-one words and devoted entirely to imposing upon carriers the duty to supply information and make required reports, and the latter by paragraph (h), which provides for serving each "tentative valuation" upon the carriers interested, upon the Governors of the States in which

the property affected may be located and upon the Attorney-General of the United States. This paragraph begins as follows:

> "Wherever the Commission shall have *completed the tentative valuation* of the property of any common carrier, *as herein directed* * * *"—*R. 4.* Italics ours.

Obviously the words "*in like manner*," in paragraph (f), and "*as herein directed*," refer to the process prescribed in the paragraphs, (a) to (e), preceding paragraph (f). It is submitted that when any term, *e. g.*, the term "tentative valuation," is specifically defined in a statute, such definition excludes every other definition and nothing that substantially fails to satisfy the statutory definition can be allowed to take the place of the statutory concept.

In this instance, any other rule would seem plainly to violate the purpose of the Valuation Act which was to make the statutory "tentative valuation" the foundation for an equally definite process, prescribed by paragraphs (h) and (i), leading to determination of value or "final value." And it is to be noted that the carriers are not the only parties having an interest in the "tentative valuations." The Valuation Act recognizes the interest of the public and paragraph (h), as already noted, requires the Commission to serve its "tentative valuations" upon the Attorney General and upon Governors of States, as representatives of the public interest. Any of these public representatives, as well as the carrier, may protest the "tentative valuation" and all are entitled to be heard upon any protest that may be filed. The specific directions of

Congress as to what should constitute a "tentative valuation" were doubtless, in part, intended to protect the public, through these representatives of the public, by affording quite full and quite definite information as to the bases of the proposed ascertainment of value; their data, methods and results. Appellants, as carriers, are not entitled to complain on behalf of others, but they are entitled to what benefit they can derive from a lawful "tentative valuation," which as to them, must satisfy the same statutory definition and requirements which it must meet when at the same time offered to the Attorney General or to any Governor of any State.

Congress has, it is evident, prescribed and defined what a "tentative valuation" shall be and has done so for purposes that are not difficult to apprehend; the Commission has no power to depart substantially from such prescription and definition. The Commission's authority to make anything a "tentative valuation" must be conditioned and circumscribed by the Congressional grant of authority and the Congressional intent, and unless the order of March 28, 1923, satisfies the Congressional intent, the fiat of the Commission cannot make it that which it is not, a lawful "tentative valuation."

Paragraph (c) of the law (*R. 3*) is highly significant in that it amounts to a specific assertion of the Congressional purpose to fix with considerable strictness the scope of the Commission's inquiries as to value and the boundaries of its authority. "*Except as herein otherwise provided,*" says this paragraph, "the Commission shall have power to prescribe the method of procedure * * *, the form in which the results of the valuation shall be submitted and * * *."

It is clear from the decision in *Missouri ex rel. Southwestern Bell Telephone Company* v. *Public Service Commission, 262 U. S., 276,* that *no significant evidence can be excluded from consideration in valuation cases without vitiating the results.* Indeed, in the Valuation Act, Congress was very plainly providing for the compilation, for general use in all proceedings subsequent to the completion of the work, of all the evidence pointed out by the decision in the leading case of *Smyth v. Ames, 169 U. S., 466.*

> "We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And, in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property"—*169 U. S., 466, 546-7.*

It was with direct reference to the foregoing, and similar judicial declarations, that the Com-

mittee of the Senate which recommended the enactment of the Valuation Act said:

> "* * * the Committee proposes * * * to enable the Commission *to secure every element of the value of the property of the common carriers,* so classified and analyzed as to enable the commission and the courts to determine the fair value of such property for rate-making purposes.
>
> "The courts from the first have used various terms descriptive of the values and elements of value to be determined as a basis for ascertaining the fair value of railway property. Some of these terms they have altogether rejected. Others have come to have an accepted meaning and significance by commissions and courts and are recognized as covering all the elements of value attaching to the property of common carriers for rate-making purposes. *When these values are once ascertained, each aids in correcting the other,* and is given such weight as it is entitled to in enabling the commission and the court to arrive at the fair value of the property of the carrier used for its purposes as a common carrier. These terms accepted by recognized authority are: (1) The *original cost to date;* (2) *cost of reproduction new;* (3) *cost of reproduction less depreciation;* (4) *other values and elements of value*—that is, intangible values.
>
> "As amended by the Senate committee, *the bill provides in the first subdivision of Section 19a for ascertaining these values*"—*Senate Report No. 1,290, Sixty-second Congress, Third Session, pp. 5-6,* Italics ours.

Manifestly, the purpose of Congress in specifically directing the Commission to ascertain and report each of the several classes or groups of evidence severally indicated in *Smyth v. Ames, supra,* and also to investigate and report all other values and elements of value, and to accompany its report with analyses and reasons, included the control and supervision of the body entrusted with the direct and initial labor of valuation. Congress intended to know, and that the public and the courts should know, fully and in detail, how values were determined. As Mr. Commissioner Potter said in his concurring opinion in the *San Pedro, Los Angeles and Salt Lake Railroad valuation case, 75 I. C. C., 463*:

> "We must remember the spirit of the Valuation Act. The *Congress did not think that the Commission would be all-wise.* There was obvious unwillingness to leave broad powers to us without a way *to know exactly how we function and what we do.* The Valuation Act is a new procedure. It is largely experimental. It is quite likely that the Congress may want to change it. *We are therefore directed to find the different values and the different elements of value and the differences between them and to analyze and explain fully our reasons.* The important purpose in all this was to open the door to our minds and mental processes *in order that the Congress and the public could see how we operate and thus determine whether we give to the Valuation Act the interpretation and construction which the Congress intended.* The thought evidently was that the

> Congress after seeing what we do under the Act might decide that it was necessary to alter it. In the early cases *what we do in fixing values is not nearly so important as to know how and why we do it. Utmost frankness and complete analysis are therefore due from us. Unless we fully explain our reasons for doing things,* I apprehend our report will be discredited and discarded"—*75 I. C. C., 463, 577-8.*

Attention will now be directed to some of the aspects in which the specific requirements of Congress seem to have been ignored or compliance expressly refused.

A. REFUSAL TO FIND ORIGINAL COST TO DATE OF PROPERTY OTHER THAN LAND.

The statutory provision is that the "tentative valuation" shall—

> "report in detail as to each piece of property other than land, owned or used * * * the original cost to date, the cost of reproduction new, the cost of reproduction less depreciation * * *"—*Section 19a, paragraph* (b), *R. 2.*

With regard to the property of The Delaware and Hudson Company, the following statement appears in the order of March 28, 1923:

> "*Original cost to date.* The original cost to date of the common carrier property of the

> carrier cannot be ascertained *owing to the inadequacy of the records*"—*R. 22,* Italics ours.

Similar statements with regard to property of other petitioners appear, in the order—*R. 35, 40, 45, 48, 51, 54, 60, 63.* Elsewhere in the order the statement as to the property of The Delaware and Hudson Company is repeated, in modified form, as follows:

> "The original cost to date of the common carrier property owned and used by the carrier cannot be determined *from the obtainable records*"—*R. 101.*

See also, *R. 119, 122, 125, 128, 130, 133, 139, 149, 171, 173, 177, 179, 182, 192, 195, 205, 218, 221, 225,* for similar statements.

Characteristic terms in the quoted statements are italicized, in order to call attention to the fact that the Commission has not said that it *cannot* ascertain original cost to date, but has said, only, that *it will not do so, unless it can perform the task without resort to any evidence not found in accounts or similar records.* The language used by the Commission varies from time to time, but it always expresses refusal to do what Congress required unless this one class of evidence is found. At one place in the order, it is "inadequacy of the *accounting* records" (*R. 35*) that is set up as a barrier to compliance with the Congressional purpose; at another it is, "the absence of the accounting records of its predecessors and those of the contractors who constructed the original road" (*R. 119*); at still another the difficulty is that the

fact "can not be definitely ascertained" (*R. 130*), for similar reasons, and, again, it "cannot be fully ascertained owing to the absence of the accounting records prior to January 1, 1888, and those of the contractor who constructed the original road"—*R. 218.*

The foregoing indicate clearly that the Commission refused to consider any evidence outside of the class suggested. Appendix 3, of the decision of the Commission in the *Texas Midland valuation case* (*75 I. C. C. 1, 108*), was, however, made a part of the order of March 28, 1923, by reference (*R. 64; the citation in the Record is 1 Val. Rep., 1, 108, but no such report was ever published and the citation finally adopted is 75 I. C. C. 1, 108, as given*), and definite and specific refusal to find original cost to date, except in the limited class of cases in which it can be established by accounts or similar records, is thus brought into the instant proceeding. The Commission, in the *Texas Midland case,* said:

> "As the Act is interpreted by the Commission original cost is a fact, to be determined from the best evidence available in each case. The cost of reproduction new is of necessity an estimate, * * *. Depreciation is necessarily an estimate, * * * But these properties have been actually produced in the past and their production has cost a given amount of money. Original cost can, *where the records suffice therefor,* be exactly known, and it is in that sense that these words are understood by the Commission"—*75 I. C. C. 1, 176,* Italics ours.

The foregoing was referred to, and the doctrine which it contains was re-affirmed, in denying the petition of National Conference on Valuation of American Railroads, which prayed the Commission to ascertain and report original cost in all its "tentative valuations"—*84 I. C. C., 9, 10.* The Commission said:

> "In our report in *Texas Midland Railroad, 75 I. C. C., 1,* we set forth sufficiently our interpretation of the requirement of the Valuation Act with respect to the reporting of original cost to date"—*84 I. C. C., 9, 10.*

A later expression found in a decision rendered on July 5, 1924, is as follows:

> "* * * records are not obtainable which would enable us to ascertain the original cost to date of the property as a whole"—*Ann Arbor Railroad, 84 I. C. C., 159, 169.*

In other words, the Commission has concluded, *as a matter of law,* that when Congress required, *in the same sentence,* the ascertainment of the three facts of (1) original cost, (2) reproduction cost and (3) depreciation, it was intended that all possible evidence was to be used to determine two of these facts and only one class (accounting records) as to the first of them. This strange theory of statutory interpretation is refuted by the Committee report and the attitude of Congress when the Valuation Act was adopted. It reads into the law a provision excluding competent evidence, one which the Congress might have put there but did not put there—*Michaelson v. United States, U. S.,* , decided on October 20, 1924.

The Commission itself had recognized, long prior to this enactment, the necessity and propriety of resorting to expert testimony, and the estimates of experts, for reinforcing the accounting records, in the determination of original cost. In the Commission's first report on Statistics of Railways, its Statistician, the late Professor Henry C. Adams, said:

> "Under such circumstances *the need of an estimate by competent authority*, free from outside influences and clothed with ample power for the investigation was recognized as imperative. Such, without doubt, was the purpose of Congress in demanding information respecting the 'cost and value of the carrier's property, franchises, and equipment'"—*Statistics of Railways in the United States, 1888; Interstate Commerce Commission, p. 6*, Italics ours.

Dr. Robert H. Whitten in his Supplement, Section 1016, page 835, anticipates resort to estimates of cost in cases in which the records are unavailable or incomplete:

> "Assuming that existing accounts and records may be only partially relied upon, an estimate of actual cost can be ascertained by much the same methods as, and with greater accuracy than, an estimate of reproduction cost."

Honorable Judson C. Clements, then a member of the Interstate Commerce Commission, now deceased, gave similar testimony before the Committee on Interstate and Foreign Commerce of the House of Representatives, on February 15, 1912, while Section 19a was in the legislative stage. He said:

"For a fair valuation, taking all those elements, I would think the right way to do it would be to have expert engineers and people who know what it takes to build a railroad, and what material is worth, help find out what it is worth, from time to time, for the ties, grading, moving of rock, filling of culverts, *aided by such historical information as they can get as to actual cost,* make a physical valuation of these things and then add to it any unearned increment value, and anything of that kind, separately stated, so that when it is all done Congress or the Interstate Commerce Commission, or any other agency of the Government that undertakes to deal with it with respect to the matter of rates, can, out of all these facts, consider in a conscientious and intelligent way what is reasonable and fair and just in regard to the rates, etc."—*Senate Report No. 1290, 62d Congress, 3d Session, p. 208,* Italics ours.

Senator Robert M. La Follette, of Wisconsin, who was the principal advocate of legislation for the valuation of railway property and made the Senate report in favor of the enactment of Section 19a (*Senate Report 1290, 62d Congress, 3d Session*), produced two expert witnesses before the Committee on Interstate Commerce of the Senate, both of whom stated that it would be necessary to resort to expert testimony and estimates in order to establish original cost. One of these, Professor Bemis, answering Senator La Follette's inquiry whether original cost could be obtained by exclusive reliance upon the books, *i. e.*, in the manner which the Commission now contends is the only permissible manner, said:

"You cannot get it from the records that have been burned for example, but you can get information of similar material—rails, for example, excavation, etc.—of that period and section of the country, frequently from other roads built about that time. Undoubtedly there are in every section roads whose books are preserved—going back to the early periods. Of course, the impossible would not be expected. *But it does not seem to me that it is wise to leave it entirely optional to the Commission.* It would be very easy for them to think—in view of the work involved—that this would be of less importance than some other matters. We do not know, however, how important it may become in any case that may arise or any court investigation afterwards; neither do we say that it is the only thing to be considered—not by any means—only that it should not be ignored. We ought to have the information"—*Testimony of Professor Edward W. Bemis; Senate Report No. 1,290, 62d Congress, 3d Session, p. 56.*

And, continuing his testimony, Professor Bemis quoted an eminent engineer of long experience in valuation work, Mr. Henry L. Gray, of the State of Washington, as follows:

"The writer affirms that the preparation of the statement of actual cost is both possible and necessary, and never in a single instance has he failed to obtain it. No more pitiful spectacle can be afforded than by an engineer attempting to say what a thing should cost, yet calmly indifferent to and ignorant of what

it actually did cost"—*Quoted by Professor Edward W. Bemis; Senate Report No. 1,290, 62d Congress, 3d Session, p. 55.*

Professor Bemis described the extent in which such estimates are useful, in the following:

> "In all the rate cases of municipal utilities we have always gone to the books of the companies to find what they show as to actual cost, using estimates only where vouchers failed, holding that vouchers are always better than estimates"—*Testimony of Professor Edward W. Bemis; Senate Report No. 1,290, 62d Congress, 3d Session, p. 56.*

Professor Commons, the second expert called by Senator La Follette, in the same investigation, said:

> "But if we go back to the principle of getting at the original cost, taking up the actual history of the property in question and inquiring from its books—and, if they are not available, from comparisons with adjoining property at the time when the acquisition was made—we could find what was the original cost or price to the corporation in the acquisition of this right of way and terminals"—*Testimony of Professor John R. Commons; Senate Report No. 1,290, 62d Congress, 3d Session, p. 101.*

The principle suggested by Professor Commons, of resort to comparative data, is frequently recognized in judicial proceedings with regard to

valuation. Attention is suggested to *O'Keefe v. United States, 240 U. S., 294,* and to *Louisville and Nashville Railroad v. United States, 238 U. S., 1,* in the latter of which it was said that:

> "While some elements of value are fixed, the market price of property and work is affected by so many and such varying factors as to make it impossible to lay down a rule by which to determine what any article or service is worth. But one of the most common measures by which to value the property or service of A is to compare it with the amount charged for the same thing by B, C and D"—*238 U. S., 1, 11.*

Senator La Follette, in the report recommending the enactment of Section 19a, clearly stated the importance of original cost, as follows:

> "Existing railroads have actually been built up through a series of years. The construction has been piecemeal and has advanced with the growth of the business. *The original cost to date,* will, at every stage of construction, take account of the prices paid at the time for property, material and labor; the amount of money paid out for legal services, engineers, architects, designers, management in organizing the corporation and constructing the road. It will show the exact amount received from the sale of stocks and bonds, and if the bonds have been sold at a discount, the price realized, and all the expenses of brokerage. It will show the amount paid in by stockholders. If stocks or bonds have been issued for property instead of cash, the value of the acquired

property will be ascertained. If the present corporation has acquired the property, or any portion thereof, at less than its physical value, or through some form of manipulation or combination or deception to the public, with a view of strengthening its monopoly character, and increasing its prospect for excessive value, or if its expenditures do not represent reasonable expenditures which ordinary business management would have approved, all of these facts will be disclosed by ascertaining the original cost to date. And it will be for the Commission and the courts to determine to what extent such investments will be allowed to be capitalized as against the public for rate-making purposes. In short, *the original cost to date will show the true investment*"—*Senate Report No. 1,290, 62d Congress, 3d Session, p. 6.*

Honorable Clyde B. Aitchison, then chairman of the Oregon Railroad Commission, now a member of the Interstate Commerce Commission, was quoted by Senator La Follette in support of the same view, as follows:

"Any rule based on reproduction value less depreciation which ignores the item of original cost, additions and betterments, is not only economically and legally unsound, but is fraught with possibilities of greatest danger to the country"—*Senate Report 1,290, 62d Congress, 3d Session, p. 6.*

Mr. Henry L. Gray, engineer of the Public Service Commission of the State of Washington was also quoted as having said:

"This work (the ascertainment of the original cost to date) was of the maximum value, as it acquainted the engineers not only with the cost of the lines as a whole, but also with the cost of many isolated structures, such as bridges, buildings, etc. It also informed them as to the overhead cost, such as engineering, legal and general expenses, and other kindred items. With this knowledge it was a comparatively easy matter to reduce the cost of the different classes of property to a unit basis, such as the cost of bridges per linear foot, the cost of buildings per square foot of floor area. Being in possession of the detailed cost of all the modern structures, a most desirable guide was available in fixing the cost of reproduction. Without the knowledge of these costs as obtained it would have been utterly impossible to intelligently dispute the estimates later prepared by the railroads"—*Senate Report No. 1,290, 62d Congress, 3d Session, p. 6.*

Professor John R. Commons, of the University of Wisconsin, and a member of the Wisconsin Industrial Commission, was stated to have spoken before the committee of the importance of ascertaining these three items of cost: (1) Original cost to date (2) cost of reproduction new, and (3) cost of reproduction less depreciation, and saying:

"The court or commission must necessarily have these three items. It must have this engineering cost of reproduction; it must have the cost of the property less depreciation; and it must have its historical cost (original cost to

date) in order to get a true, fair or reasonable value. It may be that none of these three is reasonable, and it must check and compare in order to see where it is coming out. It could not properly make a mere arithmetical compromise or average between them * * * In the original cost everything that is involved in the question of cost to the present owner is included and can not be avoided. It is included, however, under this condition which the court carries through all of its reasoning on these questions, that that price or cost must have been reasonable. But if there has been fraud or misrepresentation or monopoly unwarranted and unjust and unfair to the public, that must also be considered. If, on the other hand, the company has been in severe straits, has not been earning dividends and therefore the purchase was a sacrifice sale or price or cost, that must be given due weight. In the treatment of those questions which have been more or less touched upon by the courts, the idea is to find what, under normal and reasonable conditions, would have been paid at that time. And I think that is the reason for using the term 'original cost' instead of 'actual cost' for the real thing that is meant to be determined is the actual cost at the time of acquisition. But actual cost may be very different from reasonable cost. It may have to be an estimated cost if the books are lacking; that is, the probable cost at that time. Consequently, the term 'original' I think, has come to be pretty well recognized by commissions, by engineers and accountants, as well as those cases which come up to the courts as a basis

> upon which to ascertain the actual cost. The term 'original' is equivalent to 'actual' as against the speculative or hypothetical"—*Senate Report No. 1,290, 62d Congress, 3d Session, p. 7.*

And Honorable Milo R. Maltbie, then a member of the New York Public Service Commission, was referred to as having expressed the following opinion:

> "I think altogether too much attention has been given to cost of reproduction and too little to investment (original cost to date)"—*Senate Report No. 1,290, 62d Congress, 3d Session, p. 7.*

Other evidence of the strong reliance placed upon original cost will be found in the same report at pages 54, 55, 80-81, 93, 153, 189 and 209. At page 93, Professor Commons said:

> "I was going to show why this original cost notion is preferable to the reproduction idea. If you take the cost of reproduction based on the present prices, you must consider that those prices are changing. During the past ten or twelve years the cost of reproduction theory, when prices have risen thirty or forty per cent., would give a value probably greatly in excess of the actual or original cost when the property may have been constructed during eight or ten years of low prices. That would give an advantage to the corporation against the public. On the other hand, during a period of falling prices, which also is char-

> acteristic of prices in general, especially so in going over the whole period of railroad history, taking original prices of rails at $50 to $100 and the present prices at $28 to $22, or whatever it may be, it would be to the disadvantage of the company and in favor of the public"—*Senate Report No. 1,290, 62d Congress, 3d Session, p. 93.*

At least four of the present members of the Interstate Commerce Commission consider that knowledge of original cost is essential in valuation proceedings and can be obtained. They have so stated in recent dissenting opinions. In *Kansas City Southern Railway, supra*, Mr. Commissioner Potter, with whom Mr. Commissioner Cox concurred, said:

> "We must in all cases, as I see it, start either with original cost or reproduction cost"—*84 I. C. C., 113, 132-3.*

In the *National Conference on Valuation case, supra*, the same Commissioners united in the following concurring opinion, written by Mr. Commissioner Potter:

> "There is, in my judgment, no serious difficulty in making the findings which petitioner suggests. The majority assumed that there is difficulty and takes far too seriously the burden of finding original cost. *Like most impossible tasks, it can be done. We are not directed to report book entries.* We are to investigate and report a conclusion, and *we are not relieved from that task if some one has made it*

more difficult by destroying records. We arrived at our conclusions the same way we arrived at other conclusions—by *using the best competent evidence that is available. Where cost is the question and records are not available, evidence as to what the cost should have been is always competent.* An estimate may, in fact, be much more reliable than a book-entry of actual payment"—*84 I. C. C., 9, 14,* Italics ours.

In the same case, Mr. Commissioner McManamy said, concerning original cost:

> "* * * this finding should be made from the best evidence available in each particular case. I am also of opinion that such a finding can be made without resorting to estimates to an extent that will materially impair its value" —*84 I. C. C., 9, 22.*

The view of Mr. Commissioner Eastman, expressed in the same proceeding, follows:

> "Nor do I entertain doubt that this information can be supplied with reasonable accuracy. Much of it we are now furnishing. So far as the reasonable cost of the railroad is concerned, *such records as are available will be a great help, and so far as they are lacking or misleading the deficiencies can be supplied by estimates.* It is, perhaps, somewhat more difficult to estimate cost of production at the time the property was produced than to estimate cost of reproduction as of any given date, but essentially the two processes are the same. Surely,

> *the public cannot be penalized because the railroads have failed to keep proper records"—84 I. C. C., 9, 21,* Italics ours.

As Mr. Commissioner Aitchison, Mr. Commissioner Esch and Mr. Commissioner Campbell did not participate (*84 I. C. C., 9, 23*), in the case just cited, it seems that it was determined by eight Commissioners who were apparently equally divided on the principal question involved which was whether original cost can and should be ascertained and reported.

In its opinion in this case, the District Court expressed the conclusion that the "tentative valuation" of March 28, 1922,

> "* * * comes as near to complying with the letter* as the facts permitted,—*in the Commission's opinion"—295 Fed., 558, 561; R. 259,* Italics ours.

Further inquiry might have suggested that, in such connections, the Commission uses the words "impossible" and "undesirable," as synonyms and interchangeably. That impossibility and undesirability were thus confused in connection with another aspect of valuation became of record in this Court in *Kansas City Southern v. Interstate Commerce Commission, supra,* in which it was determined that the Commission must do what it had repeatedly declared to be "impossible." Certainly the Commission has never said that it "cannot" ascertain original cost ("owing to the inadequacy of the

*Of the Valuation Act.

accounting records," etc.), in as strong terms as those which it used in saying, in the *Texas Midland case,* that the excess cost of acquiring railway rights of way over the average values for non-carrier purposes of adjacent lands, could not be ascertained. In that case the Commission said:

> "Because of the *impossibility* of making the self-contradictory assumptions which the theory requires when applied to the carrier's lands, *we are unable* to report the reproduction cost of such lands or its equivalent, the present cost of acquisition and damages, or of purchase in excess of present value"—*75 I. C. C., 1, 62,* Italics ours.

And again in the same case:

> "The Commission has therefore felt justified in treating as practically impossible a compliance with this requirement of the statute."—*75 I. C. C. 1, 168.*

Yet the above refusal to find the excess cost of acquisition was examined, and all the disclaimers of capacity and excuses of the Commission were brushed aside and it was directed to perform its duty in the manner laid down in the statute. In declaring that the Commission must conform to the statutory direction, in terms already quoted herein (*supra, 10-2*) this Court also said:

> "It is true that the Commission held that its non-action was caused by the fact that the command of the statute involved a consideration by it of matters 'beyond the possibility of

> rational determination,' and called for 'inadmissible assumptions,' and the indulging in 'impossible hypotheses' as to subjects 'incapable of rational ascertainment,' and that such conclusions were the necessary consequence of the *Minnesota Rate cases, 230 U. S., 352*"—*252 U. S., 178, 187.*

Subsequent to the cited decision *the Commission performed that which it had declared impossible* in a large number of cases. Its *Thirty-fifth Annual Report* contains the following:

> "Prior to November 1, 1920, fifty-five tentative valuation reports, representing the properties of seventy carriers, had been issued by us. The decision of the Supreme Court of the United States handed down March 8, 1920, referred to in our thirty-fourth annual report, required us to investigate and report 'the present cost of condemnation and damages, or of purchase, in excess of present value' of common carrier lands. *Having determined the excess cost of acquisition figures for the properties covered by the fifty-five tentative valuation reports,* a supplemental tentative valuation has been issued and served, in each case, showing excess cost of acquisition of the lands and final value figures"—*Report cited, p. 55,* Italics ours.

The District Court suggested (*R. 259*) in its opinion that the age of one of the appellants constitutes a special impediment to the ascertainment of original cost. It is true that the principal appellant operates under a legislative charter granted

by the State of New York on April 23, 1823 (*New York Laws, 1823, Ch. 238*). But it was chartered as a coal and canal company and railroad powers in the State of New York, in which 665 miles of its 788 miles of main track and 1,340 of its 1,716 miles of all track were located on the valuation date (*R. 17*), were not obtained until May 9, 1867 (*New York Laws, 1867, Ch. 841*). Appellants, however, do not understand the statute or the fundamental principles of the law of evidence in the manner suggested by this reference, however mistaken in fact, to the supposed length of the period to be covered by an inquiry concerning their original costs. Appellants suppose that the rules of evidence applicable in any situation derive quality from the particular task to which they are, in that instance, applied and that where, in the lapse of time or under other conditions, it is inevitable that evidence of the superior class or classes can no longer be available, evidence of the best class that is available is accepted. Thus whenever the ascertainment of any fact becomes requisite, the rules of evidence adapt themselves to the task to be performed. With regard to original cost, the task is the Commission's and it is its duty to obtain and utilize the best available evidence; in arriving at "tentative valuations," the task and function of obtaining information sufficient for compliance with the law are exclusively its own, they are not shared even to the extent of requiring hearings.

Appellants are not advised of any distinction that should make the requirement to ascertain original cost any less obligatory than the requirement considered in the *Kansas City Southern case, supra.*

B. REFUSAL TO FIND ORIGINAL COST OF COMMON CARRIER LANDS, ETC.

The statutory directions are, that the Commission shall investigate and report, as part of the "tentative valuation," defined in the law:

> "in detail and separately from improvements, the original cost of all lands, rights of way, and terminals owned or used for the purpose of a common carrier, and ascertained as of the time of dedication to public use. * * *"—*Section 19a, paragraph "Second", R. 3.*

A typical statement, so far as the order complained of indicates the attitude of the Commission, is found in Exhibit A to appellants' petition. It is as follows and relates to The Delaware and Hudson Company:

> "The carrier owns and uses for its purposes as a common carrier 6,243.54 acres of lands. The total original cost of these lands cannot be ascertained *as the necessary accounting records are not obtainable*"—*R. 25*, Italics ours.

Similar declarations of purpose are to be found elsewhere in the order—*R. 35, 41, 49, 51, 55, 58, 61, 63.*

It will be remembered that appellant, The Delaware and Hudson Company, was chartered by an Act of the Legislature of New York, passed on April 23, 1823, to take over certain anthracite lands, portions of which are now doubtless included in its rights of way, yards and station lands, and,

of course, it has been acquiring lands ever since. *The refusal of the Commission to find* the original cost of these lands unless actual records of every transaction for an hundred years can be located and laid before its agents, is obviously tantamount to an arbitrary and general refusal to find the original cost which Congress said should be found.

The Commission's *specific refusal* is, however, made a part of the order of March 28, 1923, and of the instant proceeding, by the incorporation in the former, by reference (*R. 64*), of Appendix 3 to the *Texas Midland* decision, *supra*. The following is quoted from that decision:

> "If it is impossible to show from the records of the carrier or from any other source what the carrier did actually pay for these lands at the time they were originally acquired, *no attempt is made to estimate such original cost*"—*75 I. C. C., 1, 16½*. Italics ours.

Among the arguments offered in defense of the foregoing refusal to attempt to fulfill the Congressional requirement are the following:

> "It is difficult to determine after a lapse of from ten to fifty years the acreage value of the right of way at the time it was acquired. The sources of information which are available upon this point are manifestly of doubtful accuracy. * * *
>
> "The lands of a carrier were sometimes donated, sometimes purchased, sometimes condemned. In the absence of records there is nothing to show the proportion in which lands were acquired by these different methods.

> "Even if it were known that a particular parcel was purchased it would be impossible to determine the purchase price even though it be assumed that the market value of adjacent lands is correctly known, for *it abundantly appears from observation and from testimony produced by the carriers that the price actually paid is not determined by the market acreage value, being usually more but sometimes less*"—*75 I. C. C., 1, 164-5*—Italics ours.

Attention is attracted by the concluding clause of the foregoing. Its tacit admission that the Commission had been able to acquire sufficient data for the comparisons of cost which it summarizes is a convincing, perhaps inadvertent, contradiction of the assertion that the Congressional mandate can not be carried out. But, epitomizing its objections and its determination not to do that which Congress had directed, the Commission, in the same case, continued:

> "Plainly, an attempt to estimate original cost would in many cases involve, not the exercise of good judgment, but rather of pure speculation. The Commission has not felt justified in expending time and money in an attempt to make these estimates when they would be not only valueless but absolutely misleading when made"—*75 I. C. C. 1, 165.*

Quite obviously the value of work which Congress in its wisdom directs shall be done, is a question for Congress, not one for the Commission. The foregoing extract should, however, be compared with the language, which it closely approxi-

mates, already quoted herein (*supra, 35*), in which the Commission declared its determination not to attempt the task which this Court, in the *Kansas City Southern case, supra*, subsequently declared that it must attempt. That case had an instructive sequel, already noted herein (*supra, 36*), in that the Commission thereupon proceeded to accomplish, and did accomplish, the task which it had declined and had declared impossible.

What has been said with reference to the practicability of establishing the original cost of property other than lands by means of expert testimony is applicable, *mutatis mutandis*, to original cost of lands. The arbitrary character of the refusal of such testimony is especially evident in view of the fact that in all cases *the present value of the identical lands as to which this refusal is made has been claimed to be obtained upon the basis of the value of adjacent lands and the results are reported in the order—R. 25-6, 35-6, 41, 48, 51, 55, 58, 61, 63.* As these lands are regularly assessed for taxation and other data for comparing present with past values are readily accessible the so-called explanation is plainly without merit. There could not have been the least difficulty, had the Commission desired to obey the direction of Congress, in setting up regional index numbers, by which the original cost of any land, when such cost is not shown by the accounts, could be computed as a function of such present value. Properly supplemented so as to include cost of acquisition, condemnation, severance, damages, etc., this method would seem to meet the requirements of the Act.

C. REFUSAL TO FIND VALUE OF THE PROPERTY AS AN WHOLE AND BY STATES.

On this subject the statute reads as follows:

> "Except as herein otherwise provided, the Commission shall have power to prescribe * * * the form in which the results of the valuation shall be submitted, and * * * shall show the value of the property of every common carrier as a whole and separately the value of its property in each of the several States * * *"—*Section 19a, paragraph (c), R. 3.*

The order of March 28, 1923, contains a balance sheet (*R. 20-2*), reported as having been "stated by the carrier, as showing its financial condition on date of valuation" and in no way either sanctioned or criticized by the Commission, which shows assets of $143,733,839.81, and liabilities, including capital stock but not including the credit balance carried in profit and loss, of $125,244,230.16 (*$143,733,839 minus $18,489,609.65, corporate surplus, R. 22*). The "final value" stated for all the property for which any value has been determined by the Commission and reported in the order of March 28, 1923, is $95,834,979 (*R. 31-2*), for common carrier property and $3,181,358.41 (*R. 29*), for 1,023.93 acres of land classified as non-carrier, a total of $99,016,337.41, or $26,227,892.75 less than the excess of liabilities thus computed over the accumulated corporate surplus stated in the balance sheet. This comparison stands out in the so-called "tentative valuation" where it can have but one of two results, either it must (1) mislead

the unwary, or (2) establish the worthlessness of the methods; a lack of utility in the order of March 28, 1923, that must indubitably be attributed to the failure of the Commission to follow the direction of Congress and to value the property "as a whole."

The Commission was not ignorant of the existence of other property, the inclusion of which in its results would have obviated this complete inconsistency with the balance sheet. But it refused and omitted to value this other property, and its official cognizance of its existence, of record in the order, is confined to two short paragraphs which are quoted below:

> "The carrier had recorded investments in other companies of a par value of $53,577,137.56, which it carried at a book value of $49,501,712.34"—*R. 29.*

> "There is shown in Appendix 2, under the heading 'Miscellaneous Physical Property,' the sum of $10,280,864.44 as representing a balance shown by the carrier's books, consisting of coal lands and other items named. *No part of this property is included in the property above reported as held for purposes other than those of a common carrier and investments in other companies*"—*R. 29,* Italics ours.

Appendix 2, referred to above is in the Record (*R. 86-230*) and all that it contains with respect to the above non-carrier property is found on a single page (*R. 106*), on which nothing appears that goes further than a mere recognition of the existence and ownership of this omitted property.

It must be concluded that its omission from the valuation was intentional and deliberate. The motions to dismiss admit the allegation of appellants' petition (*paragraph XII, R. 8*) that the Commission *refused* to comply with this requirement of the law.

The omission to classify the property by States was equally intentional. The order shows (*R. 16*), that appellants own or use property in the States of Pennsylvania, New York and Vermont, but there is no statement of the distribution among these States of even the property covered by the items aggregating $99,016,337.41 (*supra*) that are given in the order—*R. 29, 31-2.* Partial and fragmentary allocations by States appear in the order (*R. 29-43*), but *there is no allocation to any State of any final value or aggregate value of property as an whole.* In the *Texas Midland* decision, *supra,* the Commission declared that it had determined not to make such assignments—*Appendix 3, 75 I. C. C., 1, 159-160.*

> "Literally interpreted, the Commission is * * * required to show the property located in a particular State. If the property has no location it does not fall within the requirement; that is, the Commission is not required to create, nor would it be justified in attempting to create by any arbitrary rule, a location which does not in fact exist. *It has been determined, therefore, not to attempt to allocate by States property embraced in the equipment accounts, but to report that in one item as non-assignable*"—*75 I. C. C., 1, 159,* Italics ours.

It would appear, from the foregoing, that because of an observation that *some* equipment moves freely and frequently across State lines, the Commission declined to find the value by States of *all* equipment, although it must be assumed to know that locomotives are largely restricted to operating divisions which are very often wholly within single States and that nearly all passenger cars are assigned continuously to services between particular terminals, their "runs" in a great many instances being wholly within State boundaries. With regard to another class of property the Commission assumed a position that is even more palpably arbitrary and remarkable. This is shown by the following from Appendix 3 to the *Texas Midland* decision, *supra*, and, therefore, a part of the order of March 28, 1923.

> "Carriers frequently own small amounts of property located off the line in States through which the railroad itself does not run. * * * This property is collected in one item and reported as non-assignable. * * *
>
> "While a literal interpretation of the language of the Act might call for an assignment of this property to the State in which it is in fact located, it has been thought that a practical and sensible interpretation of the Act would not so require"—*75 I. C. C., 1, 160.*

The practicability of compliance with the Valuation Act in this respect has been admitted in terms. The Commission has reported to Congress that values *can* be assigned to the property in different States. Under date of December 29, 1922, Mr. Commissioner McChord, then Chairman of the

Commission, and in his capacity as such speaking for the whole Commission, addressed a letter to the President of the Senate, from which the following is quoted:

> "The Interstate Commerce Commission respectfully submits the following information in response to Senate Resolution 379, adopted December 15, 1922, * * *
>
> "Up to the present time we have not undertaken to segregate by States the single-sum value of interstate carriers * * * In assembling data upon which the value of a given carrier as a whole is based, *we have collected the basic material from which information as to the values separately by States can be compiled*" —*Senate Document No. 284, 67th Congress, 4th Session, pp. 1, 3-4.* Italics ours.

In its latest *Annual Report*, referring to the above cited case, the Commission said, in part:

> "We determined not to attempt to allocate by States movable property common to all the service, but to report that in one item as non-assignable. We have not allocated to States the general items of materials and supplies, working capital, or other elements of value without a fixed situs in any one State. *We have not attempted to break up by State lines the final single sum values found for carriers.*
>
> "From time to time representations have been made to us asking segregation by States of all property and of the final single sum values. The National Association of Railway

and Public Utilities Commissioners has made *insistent representation* to us of the desirability of making such segregations. *At a conference last spring between a representative of the Commission and the Valuation Committee of that Association it was agreed that an estimate of the cost of making the segregation would be made* and the matter, in the form of a separate item of appropriation, presented to the Congress for the determination by it of the question of policy involved. This we have done, including in our 1924-25 estimates submitted to the Director of the Budget an item of $100,000 separately stated to cover this work if it should be the desire of the Congress that it be done. We can not enter upon this work on our regular appropriation.

"The demand coming from the States seems to be the result not only of a desire or need for such segregation of value for purposes of transportation regulation but also of a desire on the part of at least a number of States to work out more equal and consistent taxation systems"—Thirty-seventh Annual (1923) Report, pp. 15-6, Italics ours.

Appellants consider that the authority and the duties of the Commission, under the Valuation Act, are derived from that Act and the will of Congress expressed therein; it is not understood that they expand or contract with the expressions or desires of other political or private agencies nor even with the rise or fall in the amount of an appropriation by Congress. It is submitted that the Commission's attitude in this matter presents still another instance of:

> "* * * exerting the general power which the Act of Congress gave, and at the same time disregarding the essential conditions imposed by Congress upon its exercise"—*Kansas City Southern v. Interstate Commerce Commission, 252 U. S., 178, 188.*

D. REFUSAL TO INCLUDE ANALYSES AND REASONS.

Congress expressly directed the inclusion in each "tentative valuation" of several different analyses and specific reasons for differences, if they should be found, that it was evidently considered might or would usually occur. There are four such express directions in the paragraph beginning "First" (*R. 2*) and one in the paragraph beginning "Third" (*R. 3*). Thus, after requiring the report of (1) original cost to date, (2) cost of reproduction new and (3) cost of reproduction less depreciation, the former paragraph commands the inclusion in the tentative valuation of—

> "an analysis of the methods by which these several costs are obtained, and the reason for their differences, if any"—*R. 2.*

Following the foregoing, in the same paragraph, the Act requires the ascertainment of "other values and elements of value" and that the "tentative valuation" shall contain—

> "an analysis of the methods of valuation employed, and of the reasons for any differences between any such value and each of the foregoing cost values"—*R. 2.*

The last of these statutory requirements is in connection with the direction, in the paragraph beginning "Third," to report separately the value of non-carrier property and is that, as to this value, the "tentative valuation" shall contain—

> "an analysis of the methods of valuation employed"—*R. 3.*

The Commission has not *overlooked* these requirements as to analyses and reasons. On the contrary, it has called attention to them while expressing its refusal to follow the law, and its determination to evade its evident purpose. The order of March 28, 1923, which is here in issue, contains nothing in the way either of analyses or reasons and no references to these subjects, except the following, which occurs under the heading "In General"—*R. 64.*

> "Reference is made to Appendix 3 of the report in *Texas Midland Railroad, 1 Val. Rep., 1, 108,** which is hereby made a part hereof, for a statement of the methods employed and of the reasons for the differences between the various cost values reported"—*R. 64.*

The report referred to in the foregoing was rendered on July 31, 1918; the order from which the reference is quoted is that here in issue, entered on March 28, 1923. It appears that *the Commission's claim is that it formulated and published the analyses and reasons which Congress required to be a part of any "tentative valuation" of*

*The present reference to the report cited is *75 I. C. C., 1.*

appellants' properties, just four years, eight months and twenty-seven days before it was ready to declare the figures and amounts to which these analyses and reasons appertain. Perhaps the absurdity of this evasion is established as fully as in any other way by the fact that four and one-half pages of the Appendix thus relied upon (*75 I. C. C., 1, 168-172*) are devoted to discussion of reasons for not complying with the statutory direction, since repealed, to ascertain the excess cost over the value of adjacent non-carrier lands of the acquisition of lands for rights of way and terminals. These reasons may have had some importance on July 31, 1918, when the *Texas Midland* decision was rendered; they lost most of that importance when the Supreme Court held, in *Kansas City Southern Railway v. Interstate Commerce Commission, supra*, that they would not suffice to justify the Commission in refusing obedience to a plain direction of Congress; they lost part of the remaining importance when the Commission, subsequent to the *Kansas City Southern* decision, accomplished in a large number of cases (*supra, 36, 41*) all it had thus said could not be accomplished, and, finally all importance disappeared when Congress, on June 7, 1922 (*42 Stat., 624*), repealed the requirement which they discuss. It is certainly not surprising to find that in many other respects the analysis presented nearly five years earlier in deciding the *Texas Midland* case is inappropriate and inept in connection with the order of March 28, 1923.

Moreover, a plain and definite promise made by the Commission, in the decision of July 31, 1918,

has not been kept in the order of March 28, 1923. The "tentative valuation" before the Commission in the *Texas Midland* case did not state an aggregate value for all the property owned or used by the carrier *for its common carrier purposes.* In that case the Commission declared that it would include in all future "tentative valuations," "a single sum as the value of the property owned or used for common carrier purposes." Such a "single sum," or aggregate "final value," of common carrier property is to be found in the order of March 28, 1923, now in issue and affecting appellants—*R. 31-2.* But there is no analysis of the methods of valuation employed in arriving at this aggregate (the sum is $95,834,979, and it is believed by appellants to be grossly inadequate), nor is any analysis of the methods employed in any case or at any time in arriving at any such total to be found in the Appendix to the *Texas Midland* decision which is incorporated in the order; naturally there could have been no such analysis in that case, for at that time there was no such "single sum" value or "final value" in existence, none had been made, no methods of making any had been developed, there was nothing of the sort that could have been the subject of analysis. The promise which has not been kept as to appellants, whatever may be the case as to another carrier, found in the *Texas Midland* decision, is as follows:

> "When a finding as to a single sum value of the property is announced, such analysis of the methods by which it is arrived at and the reasons for the differences, if any, as is appropriate, will be presented"—*75 I. C. C., 1, 7.*

If the foregoing has been performed as to the Texas Midland, there is still, not even by reference or in the most superficial form, any such analysis, or alleged analysis, in the case of these appellants. Now this figure of $95,834,979 is the most important contained in the so-called "tentative valuation" of March 28, 1923. If it should stand, it might ultimately have to be substituted, as of its date of June 30, 1916, in the principal appellant's balance sheet for whatever figures now represent in that fundamentally important account the value of its railway and appurtenances.

Congress unquestionably intended that this appellant and the public should have a full and detailed analysis of this total, with definite reasons for all differences between this most significant figure and the so-called "cost values." It is to be noted that Congress was not willing to leave the public interest in the "tentative valuations" wholly to the protection of the Commission, but provided that these valuations should be served on the Attorney General of the United States, Governors of States and others, all whom are authorized to protest the results—*Section 19a, paragraph (h), R. 4.* And, equally Congress intended and planned that appellants should be given this analysis and these reasons, for their protection. The Commission has declined to formulate and declare these reasons and its resolution to withhold them was deliberate. It was plainly intended that the appellants should be left without information as to how this sum of $95,834,979 was obtained. Yet if appellants are required to proceed as though the order of March 28, 1923, conformed to the statute, they will have to predicate their criticism of this sum

upon a protest and the law restricts the hearing to matters relevant to such a protest—*R. 4-5.* The purpose of the Commission to impede attack upon this aggregate by denying to appellants and to the public the information that Congress provided they should have is declared, almost boldly, by *the vague and meaningless formula* adopted in the order of March 28, 1923, and repeated therein in stating the figure declared as "final value" for each of the appellants. This extraordinary formula is as follows:

> "*Final Value*—After careful consideration of all facts herein contained, including appreciation, depreciation, going-concern value, working capital and all other matters which appear to have a bearing upon the values here reported, the values, as that term is used in the Interstate Commerce Act, of the property of the carrier, owned and used, owned but not used, and used but not owned, devoted to common carrier purposes, are found to be as follows:"

The foregoing appears in the order many times (*R. 31-2, 43, 46-7, 49, 52, 55, 58, 61-2, 64*), without substantial change, each appearance in connection with the statement of a different aggregate, ranging from $82,000 in the case of appellant The Ticonderoga Railroad Company (*R. 58*) to $95,834,979 in the case of appellant The Delaware and Hudson Company (*R. 31-2*). This ingenious verbal device for the maintenance of obscurity has been repeated in many other valuation cases. See *Evansville & Indianapolis Railroad*, 75 *I. C. C.*, 443, 451-2; *San Pedro, Los Angeles and Salt Lake*

Railroad, 75 I. C. C., 463, 609; Atlanta, Birmingham & Atlantic Railroad, 75 I. C. C., 645, 689; Florida East Coast Railway, 84 I. C. C., 25, 60; Kansas City Southern Railway, 84 I. C. C., 113, 145; Texas Midland, 84 I. C. C., 150, 157; Ann Arbor Railroad, 84 I. C. C., 159, 179; Danville & Western Railway, 84 I. C. C., 227, 239; Southern Railway Company in Mississippi, 84 I. C. C., 253, 264; Bowdon Railway, 84 I. C. C., 277, 282-3; Wood River Branch Railroad, 84 I. C. C., 289, 293; Rhode Island Company, 84 I. C. C., 299, 302; Durham & South Carolina Railroad, 84 I. C. C., 313, 321; Knoxville, Sevierville and Eastern Railway, 84 I. C. C., 329, 335; Hoosac Tunnel & Wilmington Railroad, 84 I. C. C., 343, 348. Aside from the foregoing, which are *all the cases* in which the value of all common carrier property has been stated as a single aggregate in decisions rendered upon protests to "tentative valuations," the same formula, or practically the same formula, has been used in every "tentative valuation" so far promulgated by the Commission. The common judgment and experience of mankind warrant the statement that such a formula is never resorted to save (1) to conceal thought or (2) to cover the absence of thought. The view of two Commissioners, expressed in a dissenting opinion, is that the judgment as to value was "a coincidence of result and not of thought"—*Kansas City Southern Railway, 84 I. C. C., 113, 127.* The Commissioners quoted (Mr. Commissioner Potter and Mr. Commissioner Cox) have also referred to the absence of analysis as producing—

> "clouds of mystery over all we do"—*84 I. C. C., 25, 44;*

"wasteful uncertainty"—*84 I. C. C., 25, 44;*

"the fog for which we are responsible"—*84 I. C. C., 25, 45;*

"a jumble of guesses"—*84 I. C. C., 113, 130;*

"a jumble of elements and considerations which we do not understand"—*84 I. C. C., 9, 17.*

And Mr. Commissioner Eastman, dissenting in the *Kansas City Southern Railway case, supra,* in which the formula was used, said:

> "No attempt is made to chart the path by which the conclusion is reached or to indicate the weight given to any particular fact. A quite different sum might be substituted, as the value for rate-making purposes, without changing in any way the discussion which leads up to and is presumably intended to support the finding"—*84 I. C. C., 113, 140.*

Furthermore, in the case now at bar, except in this repeated formula, there is no reference in the order of March 28, 1923, to "appreciation" or to "going-concern value." Either the formula was developed for use in presenting some other "tentative valuation," in which appreciation and going-concern value were considered, and transferred to the order of March 28, 1923, without observing that the latter contains no other reference to either, or it was inserted merely to create uncertainty and to surround the declaration of value with an atmosphere of mystery and doubt.

All that has been said so far under the present sub-heading relates to the *analyses* required by the

statute. Reference to the extracts from the Act quoted in this connection will show that the "tentative valuations" are required also to contain "reasons" for certain differences, if they exist. Such differences do exist in the order of March 28, 1923, but it contains no reasons. The quoted reference in the order (*R. 64*), to *Appendix 3 of the Texas Midland* decision, refers the public and appellants to that Appendix for reasons as well as for analyses. That is to say for differences found or reported on March 28, 1923, between and among figures relating to the properties of appellants, all located east of the Allegheny mountains and north of Wilkes-Barre, Pennsylvania, the public and appellants are told to look to a document issued on July 31, 1918, relating to a small railroad that is wholly within the State of Texas. Moreover the values reported for appellants purport to be those of June 30, 1916 (*R. 16*) while the corresponding facts (as far as they are represented to correspond) for the *Texas Midland* purport to have been ascertained as of June 30, 1914—*75 I. C. C., 1, 80-91.*

But, if the public or appellants should turn to the cited decision, they would find no reasons at all. Everything to be found by such effort is contained in the following paragraph:

> *"Reasons for the differences between values.* By the Act the Commission is required to report not only an analysis of the methods by which the several cost values are obtained but also the reason for their differences, if any. From what has been stated in this analysis of methods, it must be clear that the reasons

> for the differences in amount between the various cost values reported, *i. e.*, the original cost to date, the cost of reproduction new, and the cost of reproduction less depreciation, are to be found in the essential differences in the nature of the inquiries which must be made in order to ascertain each of those cost values, respectively, based as they are and must be on varying assumptions, attended by varying conditions in which the actual and the hypothetical are contrasted and affected by fluctuations and trends in the prices of labor and material"—*Appendix 3, 75 I. C. C., 1, 181-2.*

The importance of such analyses and reasons as the law indicates has always been recognized. In the Commission's first report on *Statistics of Railways,* published in 1889, it was observed that—

> "It was also felt that no investigation which published conclusions only, without disclosing the methods by which those conclusions were obtained, could ever gain the confidence of the public or serve the basis of further legislation" —*p. 6.*

The Senate Committee report, submitted by Senator La Follette, but representing an unanimous committee, recommending the enactment of Section 19a (*Senate Report No. 1,290, 62d Congress, 3d Session, submitted on February 20, 1913*), contains abundant evidence of insistence upon the analyses and statements of reasons which the majority of the Commission, over the sharp and strong protest of a minority that is scarcely inferior even in num-

bers, now refuses to supply. On its first page this report expresses the purpose of the Committee in the terms which follow:

> "* * * the Committee proposes * * * to enable the Commission to secure every element of the value of the property of the common carriers, so classified *and analyzed* as to enable the Commission and the courts to determine the fair value of the property for rate-making purposes."—*Report cited, 5*. Italics ours.

On page 195 of the same report the late Professor Henry C. Adams, for some twenty-five years Statistician to the Commission, is quoted as saying:

> "More depends upon the analysis of the total value and of the definitions of the headings under which that total is classified than upon any other one factor."

On pages 132-3, the following is reported:

> "Senator La Follette: And is any other term required in order to enable the Commission to ascertain all of the values of railway property which may in any way be considered for the purposes of this bill—provided in the bill itself?
>
> "Professor Commons: It seems to me it takes care of everything. It says first: 'Shall value all of the property.' Then it mentions certain items. Then it says: 'Separately other values and elements of value.' Then it requires the reasons for the differences between these several values and intimates, or makes

plain, I should think, that it is as comprehensive as any party to a suit would present to the Commission to be considered as an element of value, which should be taken into account. It is consistent, I take it, in the terms used with those which the courts now use and which are recognized."

On page 59, it appears that Professor Bemis said:

"The purpose there is to make sure that the details are given to the public as well as the summary. *We not only want a value but we want a detailed analysis of values.* We want the detailed values of the various elements. That runs through the entire bill, and it should be, I think, brought out on any occasion where there would be any doubt."—Italics ours.

And again, on page 74, the same witness being under examination by Senator Cummins, the following is reported:

"Senator Cummins: I am assuming, of course, that this bill is intended to furnish information upon any theory—

"Mr. Bemis: Exactly. That is my theory.

"Senator Cummins: At least, the theory held by reasonable men with regard to value. Therefore, I was asking whether it did, in your opinion, authorize the Commission to furnish the information along the line I have suggested, namely, a consideration of the value of the property, not according to its original

cost, not upon the theory of the cost of reproduction, but upon the theory of the value of the property as used for a specific purpose, namely, a railroad purpose?

"Mr. Bemis: I do not believe the Act is clear on that point. I think that is one of the points of discretion thrown upon the Commission. *Only they must state how they reached their conclusions,* for at the top of page 5 they are required to give 'an analysis of the methods of valuation employed and of the reasons for differences between any such value and each of the foregoing cost values.' I do not think the Commission's hands are tied. They are obliged to make different valuations on different bases, but aside from ascertaining original cost of rights of way, they might take but one method of determining value, namely, reproduction value to-day, when you and I would think they should have taken some other."—Italics ours.

The views of a majority of the Commission, which have led to the omission of analyses and reasons, so far as they have been made public, appear to have varied from time to time. In the *valuation case of Atlanta, Birmingham and Atlantic Railroad, 75 I. C. C., 645,* decided on July 20, 1923, they were indicated as follows:

"We have * * * incorporated herein by reference the analysis of methods published as Appendix 3 of the report of the *Texas Midland case.* In arriving at the final-value figure reported, all of the separate costs and values found have been considered, together with all

the underlying facts contained in the very voluminous record made in this case. In giving consideration to these evidential facts we have been mindful of the direction of the Supreme Court as to the scope of the inquiry necessary to ascertain such value. *Smyth* v. *Ames, 169 U. S. 466, 546-7; Minnesota Rate cases, 230 U. S. 352.* In the latter case the court said, at page 434, 'The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas but must be a reasonable judgment, having its basis in a proper consideration of all the relevant facts.' District Judge Booth, in *City of Winona v. Wisconsin-Minnesota Light & P. Co., 276 Fed., 996, 1001,* said: 'That there can be no mathematical certainty in such a judgment goes without saying, nor does any formula exist which can be used in all cases.'

"No further analysis of the methods used in arriving at the single-sum value figure than has already been stated is necessary"— *75 I. C. C., 645, 670-1.*

Views radically divergent from the foregoing were expressed on behalf of four members of the Commission in the valuation case of *Evansville and Indianapolis Railroad, 75 I. C. C., 443,* decided only nine days earlier than the case above quoted. Mr. Commissioner Eastman, with whom Mr. Commissioner Potter and Mr. Commissioner Cox concurred, in a dissenting opinion, said:

"The report does not indicate in any way the method or process by which that value was determined, and yet this is the thing of crucial

> importance in our valuation work. Fundamental questions of law and public policy are involved, many of which have been argued before us in contested cases, no one of which has yet been decided"—*75 I. C. C., 443, 445.*

In a separate opinion, concurring in part with the majority, Mr. Commissioner Daniels, quoting the sentences of the statute by which the Commission is directed to give analyses and to state reasons, said:

> "The method of reaching the valuation in this case, however, seems to me to be in disregard of the express mandate of the statute * * * I am of opinion that the report is defective in failing to follow the explicit mandate of the statute"—*75 I. C. C., 443, 444-5.*

In a more recent case, decided on January 15, 1924, the majority of the Commission appears to have abandoned the explanation of its omission of analyses, advanced in the earlier case (*supra, 60-1*) and to have reverted to the ground of impossibility so readily resorted to in other connections. The majority report includes the following:

> "Where the duty of finding and fixing value reposes in a number of individuals, they may reach conclusions in which all are agreed, although each may give different weights to the various factors, and although they reach their individual conclusions by materially different processes. It is, therefore, not at all times possible, for a Commission to analyze its individ-

> ual and composite processes of determination of values"—*Florida East Coast Railway, 84 I. C. C., 25, 33.*

What appears to be the same idea was expressed, in the *National Conference on Valuation Case, supra,* as follows:

> "A detailed analysis of the method of arriving at a judgment would in the nature of things call for a description of the mental processes of those to whom is delegated that function, and in our case this would involve setting forth the mental processes of eleven men, who may have reached the same conclusion by different paths"—*84 I. C. C., 9, 13.*

See, also, Second *Texas Midland decision, 84 I. C. C., 150, 155.*

One defect in the foregoing reasoning is that *it appears to rest upon the unsound postulate that the Commission acts upon its proper authority,* and upon denial of the principle that it possesses no power save that conveyed by the Interstate Commerce Act, in this case by Section 19a of that Act. And Section 19a confers no power to value any property except in the manner therein prescribed, which requires, *inter alia,* analyses and reasons. It may be that the divergencies of view and of conclusions, presumably always attending the initial and early conferences of groups of men, were quite within the Congressional conception of the normal processes of the body upon which power was conferred, and that it was upon the resolution of these differences that the wisdom of the Federal

legislature relied as a guarantee of adequate deliberation and affording hope of the ultimate emergence of approximately accurate and satisfactory valuations. The consideration and discussion necessarily incident to an earnest effort at such a solution of differences would seem to justify anticipations of trustworthy results that could not rationally be based upon any mere agreement to adopt aggregates which the united wisdom of the valuing body would confessedly be unable to explain or to defend. In the cited case, Mr. Commissioner Potter, with whom Mr. Commissioner Cox concurred, strongly dissented from the view that analyses and reasons could not and should not be given. Their answer to the suggestion that eleven men, or Commissioners, cannot agree upon reasons and analyses is pointed and direct. They:

> "* * * do not share at all the notion that it is not possible for a Commission of eleven men to announce principles. Most of the uncertainties that exist would be cleared away by finding the answers to a dozen questions or so, which would involve fundamental principles" —*Florida East Coast Railway, 84 I. C. C., 25, 45.*

In another valuation case, these Commissioners, referring to the Commission, as an whole, said:

> "* * * we have not equipped ourselves for intelligent work by the adoption of principles" —*Kansas City Southern Railway, 84 I. C. C., 113, 130.*

Repeating, in a third case, their belief that the announcement of principles and methods would re-

move the greater part of the obstacles to agreement within the Commission, they said:

> "If it be true that we are incapacitated because we are eleven, that may be a reason for recommending to the Congress that the work be taken away from us and given to fewer men. But it is no reason why the work should not be done"—*National Conference on Valuation, etc., 84 I. C. C., 9, 18.*

The similarity between the formula adopted by the Interstate Commerce Commission (*supra, 53*) and that brought to the attention of this Court in *Bluefield Waterworks and Improvement Company v. Public Service Commission of West Virginia, 262 U. S., 679, 688-9,* will be noted. Effective judicial review may be impeded by the adoption of such a formula—See dissenting opinion of Mr. Justice Brandeis in *Southwestern Bell Telephone Company v. Public Service Commission, 262 U. S., 276, 296-8; Monroe Gaslight and Fuel Company v. Michigan Public Utilities Commission, 292 Fed., 138, 143-4.* That this formula and the refusal of analyses and reasons of which it is an incident, have been intended to accomplish such a result has been suggested by members of the Commission—See concurring and dissenting opinions in *Florida East Coast Railway, 84 I. C. C., 25, 44-50; Kansas City Southern Railway, 84 I. C. C., 113, 134-9; National Conference on Valuation, etc., 84 I. C. C., 9, 17-20.* In the latter case, Mr. Commissioner Potter, in a concurring opinion, after referring to the rule in *Smyth v. Ames, supra, 16,* said:

> "It was to prevent us from overlooking any of these elements and to force proper consideration of them so that our action might be reviewed and the law amended, if need be, that the Congress dealt so specifically in its instructions as to the findings we should make. Obedience to those instructions is not only due to the source of our authority but is essential to valid action"—*84 I. C. C., 9, 20.*

Mr. Commissioner Cox concurred in the foregoing. These Commissioners have also united in suggesting some of the reasons for making and publishing the analyses which they favor. One of these reasons is that such analyses would tend to strengthen the work of the Commission itself. This view was expressed as follows:

> "In this way, an administrative body would assure consistency in its work, exhibit intelligent reasons for what it does, furnish opportunity for a review of its action by other tribunals and provide protection against its mistakes"—*84 I. C. C., 9, 17.*

Another reason expressed by these Commissioners is that the absence of analyses and reasons necessarily impedes judicial review which, they aver, ought to be facilitated. This has been expressed as follows:

> "Our method is peculiarly unfair to the courts, for it throws burdens on them that are properly ours"—*Florida East Coast Railway, 84 I. C. C., 25, 44.*

> "The first duty of a tribunal is to aim at just conclusions. The second is to so act that error will be discovered and corrected. No tribunal may, with propriety, act in such manner as to prevent the weighing of its reasons or the testing of its motives"—*National Conference on Valuation, etc., 84 I. C. C., 9, 20.*

The same Commissioners have also expressed the opinion that the valuation work of the Commission itself is seriously impaired by the absence of analyses and reasons, owing especially to the fact that the onerous duties of the Commissioners make it impossible for them personally to acquaint themselves with the original and basic records. The following is from their dissenting opinion in the *Florida East Coast Railway case:*

> *"It is not possible for the members of the Commission to examine the record in these valuation cases.* Under such circumstances, *unless our reports clearly set forth and analyze the methods used* in building conclusions, and show the treatment of the different elements, varying in different cases, that influence value, so that the report may be convincing in and of itself, *even we, whose work the report is, can not have satisfactory reason for our action"*—*84 I. C. C., 25, 44,* Italics ours.

Appellants submit that the views of these dissenting Commissioners are sound and accord with the intent of Congress as expressed in the statute. They refer, also, with confidence in its accuracy, to another statement in one of the dissenting opinions already quoted:

> "Analysis, principles and rules could be stated. The case is peculiarly appropriate for such treatment and explanation of reasons"—*84 I. C. C., 25, 41.*

The expressions of Mr. Commissioner Potter, concurred in by Mr. Commissioner Cox, and of Mr. Commissioner Eastman, with regard to the failure of the Commission to submit analyses and reasons, and with regard to other errors of omission, in their separate opinions in *National Conference on Valuation of Railways, supra*, are so significant that they are reprinted, together with a sufficient extract from the "majority report and opinion" (in which apparently but four Commissioners participated), that they have been reprinted as Appendix I to this brief, *infra, 172.*

E. REFUSAL TO REPORT "OTHER VALUES AND ELEMENTS OF VALUE."

The Interstate Commerce Act, by Section 19a, directs, with regard to the "tentative valuation," as follows:

> "The Commission shall * * * ascertain and report separately other values and elements of value"—*R. 2.*

With regard to The Delaware and Hudson Company, the response of the Commission to the foregoing, contained in the order of March 28, 1923, is the following:

> "No other values or elements of value to which specific sums can now be ascribed are found"—*R. 32.*

Identical statements with regard to the other appellants and the Plattsburgh and Dannemora (owned by the State of New York) also appear in the order—*R. 37, 43, 47, 49, 52, 55, 58, 62, 64.* This is *another formula,* repeated many times, not only in the order of March 28, 1922, now in issue, but in substantially all "tentative valuations" and in numerous cases in which protests to "tentative valuations" have been considered—See *Texas Midland Railroad, 75 I. C. C., 1, 68-9, 79; Winston-Salem Southbound Railway, 75 I. C. C., 187, 206; Kansas City Southern Railway, 75 I. C. C., 223, 316; Evansville & Indianapolis Railroad, 75 I. C. C., 443, 451.*

The terms of these disclaimers command attention. "No other values * * * are found," literally understood, means no more than that the Congressional direction has not been executed; "specific sums" cannot "*now*" be "ascribed," plainly suggests that they might be so ascribed at some other time or might be at this time if the investigation had not been neglected. The Commission certainly does not deny that "other values" exist or that it has capacity and means to investigate, ascertain and report them in obedience to the statute. Such a denial would be refuted by its own reports. Thus, in its *Fifth Annual (1891) Report,* the Commission, *at page 6,* said:

> "An instructive comparison with the actual capitalization of railways is permitted by the table in the report showing the valuation of railway property computed on the basis of the amount of money which the property has actually earned for its owners during the year end-

ing June 30, 1890. If interest payments, and final net earnings available for dividends be capitalized at five per cent, it appears that, *regarded as a five per cent* investment, the value of railway property in the United States, judged from the operations of the year ending June 30, 1890, was $6,627,461,140 which is equivalent to $42,374 per mile of line. In the New England States, Group I, the value of railway property, considered as an investment, exceeds its capitalization, it being $57,867 per mile of line; in the Middle States, Group II, the value of railway property is $109,741 per mile of line, a sum slightly less than the actual capitalization; in all other parts of the country the valuation of railway property on the basis of actual earnings falls below the actual capitalization. In Group X, for example, where the capitalization is $87,104 per mile of line, the valuation is $22,762 per mile of line."

That there is an "other value" to be ascertained from consideration of the values of bonds and shares of stock is officially recognized by the Bureau of the Census, as shown by the following from one of its publications:

"The valuation submitted in this report may be properly defined as the commercial value of property used by railways in connection with the business of transportation. By 'commercial value' is meant the estimate placed upon the worth of property regarded as a business proposition * * *. The two fundamental considerations by which the market is in-

> fluenced in placing a value upon property when bought or sold, are the expectation of income arising from the use of the property, and the strategic significance of the property" —*Bulletin 21, Commercial Valuation of Railway Operating Property in the United States; 1904; Department of Commerce and Labor, Bureau of the Census; p. 8.*

Reference to market prices has also been sanctioned by this Court, in *Taylor v. Secor, 92 U. S., 575:*

> "It is, therefore, obvious that, when you have ascertained the current cash value of the whole funded debt, and the current cash value of the entire number of shares, you have, by the action of those who above all others can best estimate it, ascertained the true value of the road, all its property, its capital stock and its franchises; for these are all represented by the value of its bonded debt and of the shares of its capital stock"—*92 U. S., 575, 605.*

In its *Annual Report* for the year 1903, the Interstate Commerce Commission referred to "other values," in terms that at least suggest value arising out of present and prospective use, saying:

> "An inventory and an appraisal of the elements that make a business profitable are as necessary as an inventory of the physical elements of its plant and equipment"—*Seventeenth Annual (1903) Report of the Interstate Commerce Commission, p. 31.*

Recognition of the "other value," that results from use is found, also, in the Commission's *Annual Report* for 1888, in which, *at page 64,* the following appears:

> "The present value of a railroad property is necessarily very largely matter of opinion only; it depends upon a vast number of contingencies and uncertainties, a road apparently of great value to-day may soon become worthless by the opening of a competing line having superior advantages, or by the competitive struggles of other lines which operate to reduce the income of all; the value of a railroad largely results from the personal characteristics of its officials; the policy pursued by its directors, whether conservative and economical or aggressive and daring, is a great factor in the determination of the current value of the property; a railroad property is not necessarily worth what it would cost to replace it, and on the other hand, it may be worth very much more than that."

In striking contrast with the Commission's attitude toward "other values," under the Valuation Act, is this Court's definition of value in *International Harvester Company v. Kentucky, 234 U. S., 216,* where it is said:

> "Value is the effect in exchange of the relative social desire for compared objects expressed in terms of a common denominator"—*234 U. S., 216, 222.*

And this Court has repeatedly recognized the "other value" arising from use, present and prospective, as paramount:

> "But the value of property results from the use to which it is put and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use"—*Cleveland, Cincinnati, Chicago & St. Louis Railway v. Backus, 154 U. S., 439, 445;* quoted and reaffirmed, *Branson v. Bush, 251 U. S., 182, 187.*

The earlier of the decisions just cited contains a very apt illustration of the difference between the real value of two properties having identical physical elements and precisely the same cost and cost of reproduction new, with or without allowance for depreciation. It is as follows:

> "Suppose there be two bridges over the Ohio, the cost of the construction of each being the same, one between Cincinnati and Newport, and another twenty miles below and where there is nothing but a small village on either shore. The value of the one will, manifestly, be greater than that of the other, and that *excess of value will spring solely from the larger use* of the one than of the other"—*154 U. S., 439, 446,* Italics ours.

Other expressions of similar character are frequent and a few of them are given below:

> "The difference between a *dead* plant and a *live* one is a *real value,* and is independent of any franchise to go on, or any mere good will as between such a plant and its customers"—*Omaha v. Omaha Water Company, 218 U. S., 180, 202,* Italics ours.

"That there is an element of value in an assembled and established plant, doing business and earning money, over one not thus advanced, is self-evident. *This element of value is a property right,* and should be considered in determining the value of the property, upon which the owner has a right to make a fair return when the same is privately owned although dedicated to public use"—*Des Moines Gas Company v. Des Moines, 238 U. S., 153, 165,* Italics ours, quoted and reaffirmed, *Denver v. Denver Union Water Company, 246 U. S., 178, 191.*

As to value in use, see also:

Monongahela Navigation Company v. United States, 148 U. S., 312, 328;

Adams Express Company v. Ohio State Auditor, 166 U. S., 185, 219-226;

Louisville & Nashville Railroad Company v. Greene, 244 U. S., 522, 540;

Cudahy Packing Company v. Minnesota, 246 U. S., 450, 456;

Union Tank Line v. Wright, 249 U. S., 275, 282;

St. Louis and East St. Louis Electric Railway Company v. Missouri, 256 U. S., 314, 317-8;

Omnia Commercial Company v. United States, 261 U. S., 502, 513;

Brunswick & Topsham Water District v. Maine Water Company, 59 A., 537, 539;

Cedar Rapids Gas Light Company v. Cedar Rapids, 144 Iowa, 426, 120 N. W., 966, 48 L. R. A., N. S., 1025, 1031, affirmed, 223 U. S., 655.

The value of certain shares of the capital stock of the Grand Trunk Railway Company, of Canada, was the subject of an arbitration which was concluded by a decision rendered on February 7, 1921. Mr. Chief Justice Taft, not then a member of this Court, delivered a separate opinion from which the following has been taken:

> "The whole stock of the railway is valuable or otherwise as the ownership and control of the physical property of the railway as a going concern in the discharge of its public duties will enable it to earn a sufficient amount to pay dividends on the stock. *We are, therefore, to capitalize its net earning capacity, present and potential, and fix the value of the stock on that basis.* Its earning capacity, present and potential, is what is now earned, and what it may be expected to earn under reasonably probable conditions. Net earnings are the revenue received less the operating expenses. What determines the revenue of a going railway are the amount of its business and the rates it can charge"—Italics ours.

Sir Walter Cassels and Sir Thomas White, the other arbitrators, in separate opinions, expressed the same view and all arbitrators appear to have considered that the values in issue were to be derived from the value of the railway system, as an whole, in use as a "going concern," diminished by capital obligations possessing rights prior to those of the various issues of capital stock.

This "other value," arising directly out of use, is recognized in the very recent decision in *South*

Utah Mines and Smelters v. Beaver County, 262 U. S., 325, rendered on May 21, 1923, in which this Court, speaking by Mr. Justice Sutherland, said:

> "The value of property bears a relation to the income which it affords. If it be property whose production is uniform and of indefinite duration the capitalization of the net income derived from it at the going rate of interest, in the absence of a more certain method, will furnish a reasonable measure of the value"—*262 U. S., 325, 330.*

The Constitutional guaranty extends to the use of property as well as the property itself:

> *Northern Pacific Railway Company v. North Dakota, 236 U. S., 585, 595, 599, 600, 604;*
> *Norfolk and Western Railway Company v. Conley, 236 U. S., 605, 609, 614;*
> *Buchanan v. Warley, 245 U. S., 60, 75, 81-2;*
> *Brooks-Scanlon Company v. Railroad Commission, 251 U. S., 396, 399.*

Testifying before the House Committee on Interstate and Foreign Commerce, which was considering the measure that eventuated in Section 19a, Honorable Balthasar H. Meyer, now a member of the Interstate Commerce Commission and of its Division I, and one of those who participated in the entry of the contested order of March 28, 1923, said:

> "My point is that there are other elements than values of physical properties, *which, as*

> *a matter of fairness, must be considered,* but it may not be necessary for ordinary regulating purposes always to ascertain the 'fair value' "—*Senate Report No. 1,290, 62d Congress, 3d Session, p. 225,* Italics ours.

Such assertions and arguments as the foregoing must have approved themselves to the legislative mind, for the report of the Senate Committee, already quoted, *supra, 17,* under the heading: "Other values and elements of value—that is, intangible values," says, *at page 8:*

> "This classification provides for going-value, good-will value, and franchise value. Whether any or all of these values will be considered by the Commission or the courts in determining the fair value of the property, and, if so what importance shall attach to them, is a matter for the Commission and the courts. * * * The Committee has, it is believed, provided for ascertaining every element of value which, upon recognized authority, should be considered."

In the *Texas Midland* decision, *supra,* the Commission said:

> "* * * it is apparent that it was the intent of Congress to require a statement of all those costs, values, and other circumstances which might bear upon the value of the property, for rate-making purposes at least, and possibly for other purposes"—*75 I. C. C., 1, 66.*

The foregoing was an obviously necessary conclusion from the proceedings and report of the Senate Committee, which, as already indicated

herein, very plainly show that the plan of the Valuation Act comprised a united and co-ordinated inquiry, every prescribed element of which was deemed in its own degree essential to the purposes the Congress intended to serve. It is inconceivable that it was ever intended, or imagined, that the administrative agency upon which Congress conferred authority to execute the plan, would assume the legislative power to rule out and exclude from every inquiry any of the categories of investigation which Congress designated. Yet this is precisely what the Commission has attempted, as evidenced by this Record, in the case of original cost to date (*supra, 19, 38*) and in the case of "other values and elements of value." Thus the Congressional will has been denied.

Mr. Commissioner Hall, Mr. Commissioner Potter and Mr. Commissioner Cox would apparently agree to the foregoing—See *concurring opinion of the first named and dissenting opinion of Mr. Commissioner Potter in Florida East Coast Railway, 84 I. C. C., 25, 37, 46-8.* In the dissenting opinion there is a partial summary of the data that should be included under this heading.

It should be borne in mind that appellants are not now here to ask a determination as to the value of their properties, either upon the basis of present or prospective use, or on that of any "other value or element of value" or upon any basis. On the contrary, they are here to ask that the Commission shall be required to conform to the law in the preparation of a lawful "tentative valuation" so that the determination of value may proceed in the manner prescribed and intended by Congress.

F. REFUSAL TO INCLUDE CERTAIN PROPERTY USED FOR COMMON CARRIER PURPOSES.

The words with which the Valuation Act begins contain the general mandate to the Commission; the balance of the Act supplies the details, definitions and limitations. These beginning words require—

> "That the Commission *shall,* * * * investigate, ascertain and report, the *value of all the property owned or used* by every common carrier subject to the provisions of this Act"—*Section 19a, paragraph (a), R. 2.*

Thus the first words of the law require the inclusion of all property owned or used. Paragraph (b) provides that the tentative report shall contain certain data in respect of "each piece of property, other than land, owned or used * * * for its purposes as a common carrier"—*R. 2.* Similarly, the paragraph beginning "Second" calls for certain data concerning "all lands, rights of way, and terminals owned or used for the purposes of a common carrier" and that beginning "Third" requires facts as to property "held for purposes other than those of a common carrier"—*R. 3.* These categories clearly include all property that any corporation subject to the Interstate Commerce Act could own or use; the comprehensive and all-inclusive purpose of Congress is plainly revealed and cannot be questioned.

The Commission, in the order of March 28, 1923, and in other similar orders, has refused (*R. 8-9*),

to give effect to this purpose and has *set up a rule of exclusion of its own,* not founded upon any words to be found in the law, the effect of which, in the instant case, has been to deny to appellant The Delaware and Hudson Company any value on account of important and extensive railway property; including about *thirty-five miles of its main line.* Appendix 2 of the order of March 28, 1923, contains (*R. 113*), an incomplete list of the excluded common carrier property, no part of which is included or represented in any figure, amount or value to be found in the order—*Petition, XII, XIV; R. 8.* This list and the heading under which it appears are as follows:

"*TRACKAGE RIGHTS:* In addition to the property leased or operated as agent, the carrier is granted the use of the property of other companies, * * * as follows:

Name of grantor	Between	State	Miles
Boston and Maine Railroad	Troy and Eagle Bridge	N. Y.	22.04
	Mechanicville and Eagle Bridge	N. Y.	19.43
	Crescent and Coons	N. Y.	6.80
	Coons and West End Mechanicville	N. Y.	1.90
The Central Railroad Company of New Jersey	Hudson and Union Junction	Penn.	1.34
Erie Railroad Company	Carbondale and Jefferson Junction	Penn.	35.01
	Binghamton and Owego	N. Y.	22.00
Lehigh Valley Railroad Company	South Wilkes-Barre and Wilkes-Barre	Penn.	1.62
The Troy Union Railroad Company	In the City of Troy	N. Y.	2.03
Wilkes-Barre Connecting Railroad Company	Buttonwood and Hudson	Penn.	5.04
	Total		117.21

It will be noted that the heading of the foregoing shows that the appellant possesses the right to use the properties enumerated and, also, that the Valuation Act requires, in terms, the valuation of "all the property owned or used" (*R. 2*), by each carrier subject to the law. The allegations of appellant's petition (*paragraphs XIII and XIV*), admitted as true by the motions to dismiss, are that *the Commission refused* to include this property and that it is actually used by appellants for their common carrier purposes.

Attention is especially invited to the sixth item in the foregoing list; namely, 35.01 miles of railway between Carbondale and Jefferson Junction, Pennsylvania, owned by Erie Railroad Company. The appellant The Delaware and Hudson Company enjoys the use of this part of its railroad under a contract running for an hundred years from January 1, 1898—*R. 8.* It is a part of the main line of the railway system operated by that appellant and is *the sole means by which it maintains access to the Anthracite Region of Pennsylvania, the source of almost half of its freight traffic.* It is used and actually traversed by a very large proportion of the tonnage which this appellant moves as a common carrier. But it is also used by Erie Railroad Company, for certain of its common carrier purposes; hence the Commission wholly excludes it from valuation as part of the property used by The Delaware and Hudson Company. This exclusion was not accidental or an oversight; it merely applied a settled policy of the Commission. This is shown by the following extract from the *Texas Midland* decision, *supra:*

"It often happens that a carrier which owns and uses its property gives to some other carrier a qualified use in that property in common with itself. Such use is generally denominated a trackage right, and is the right to use the tracks of the owner for a compensation usually varying with the extent of the use. Where such an arrangement exists as to property which is of sufficient value to be of significance the portion in which trackage or similar rights are granted is inventoried by itself and the fact and nature of the use described in the inventories both of the owner and the user.

"This will be made clearer by an illustration. The trains of the Texas Midland Railroad run from Paris upon the north to Ennis upon the south. Beginning at Paris the first thirty-seven miles of line are owned by the Texas Midland; the next fourteen miles between Commerce and Greenville are owned by the St. Louis Southwestern Railway Company of Texas, commonly known as the Cotton Belt; the remaining seventy-four miles are the property of the Texas Midland. It will be seen, therefore, that the use of this portion of the line between Greenville and Commerce makes up a part of the through line of the Texas Midland from Paris to Ennis.

"The portion between Greenville and Commerce is made a valuation section upon the Cotton Belt and the various costs are determined with respect to that valuation section and reported in detail in the inventory of the Cotton Belt. The inventory of the Texas Midland shows the fact of this use and the valuation report upon the Texas Midland gives the

terms and conditions of that use. The cost of reproducing this valuation section is not, however, carried into the used column of the Texas Midland.

"The reason for this is obvious. If this reproduction cost appears in the used column of the Cotton Belt and again in the used column of the Texas Midland, the cost has been duplicated. It has been the desire of the Commission to appraise all the carrier property operated by carriers subject to its jurisdiction, but to report that property but once. When the used column of all carriers covered by this appraisal is totaled, it should give the total reproduction costs of all common-carrier property in the United States without duplication. This cannot be done if the claim of the carriers that all property over which a particular carrier operates shall be included as used both by the owner and by the user.

"It is believed that the method adopted fully complies with the statute. For example, the portion of the Cotton Belt, above referred to, is inventoried. The fact of its use is referred to both in the inventory of the Cotton Belt and in the inventory of the Texas Midland. The conditions under which the use exists are set forth in detail both in the report upon the Cotton Belt and in that upon the Texas Midland. When in the valuation of these properties it becomes essential to know the cost of reproduction new or of reproduction less depreciation, the facts can be ascertained by reference to these reports; and the same of original cost if that can be shown. The physical property is not changed by this dual use. It can exist but

once. If a part of the cost of that property is to be credited to the Texas Midland by virtue of the fact that it operates its trains over it, a corresponding portion should be deducted from the cost of the Cotton Belt. This property is used but once for the benefit of the public and ought not to be reported as twice used—*75 I. C. C., 1, 123-4.*

This policy of exclusion has been continued—*In the Matter of Making Inventories, etc., 84 I. C. C., 1, 6; Danville and Western Railway, 84 I. C. C., 227, 230; Durham and South Carolina Railroad, 84 I. C. C., 313, 315-6.*

Appellants' contention that the exclusion of all this property "used" by them for their common carrier purposes is a palpable violation of an unmistakable command of Congress, does not seem to be susceptible of contradiction. Congress directed the Commission to value the property of "every common carrier" and to "report the value of all the property owned or used" by "every common carrier"—*R. 2. There was no direction to avoid such duplication as that suggested* in the foregoing; if such duplication results from carrying out the will of Congress, that body must be assumed to have intended it, the Commission has no such responsibility. The Valuation Act contains no direction to make any aggregate in which such duplication could occur, although authority for such aggregations and necessity for them may be found in later legislation, notably in Section 15a; but nothing could be simpler than to guard against such duplications while complying fully with the law by valuing all the property "used" by each carrier and

including all such property in the valuation of each carrier, but making the requisite corrections whenever larger aggregates were attempted.

Attention is requested to the allegations of paragraph XIV of the petition (*R. 9*), which show similar refusals to value to the appellants other property also used for their common carrier purposes.

That appellants are entitled to have all the railway and railway property they use included in their "tentative valuation" is a necessary deduction from the decision of this court in *Groesbeck v. Duluth, South Shore and Atlantic Railway, 250 U. S., 607,* as well as from the express terms of the Valuation Act. In the cited case, it was said that:

> "Every part of the railroad system over which the passenger is entitled by the Act to ride for a two-cent fare must be included in the computation undertaken to determine whether the prescribed rate is confiscatory. This is true, at least, in the absence of illegality or mismanagement in the acquisition or operation of the division in question; and of such there is not even a suggestion in the record"—*250 U. S., 607, 612.*

G. *REFUSAL TO INCLUDE THE WORKING CAPITAL ACTUALLY OWNED OR USED, AS COMMON CARRIER PROPERTY.*

Working capital, *i. e.*, cash and materials and supplies essential to the operation of a railway ex-

tensively engaged in interstate commerce, would seem undeniably to be property used for common carrier purposes, within the intendments of paragraph (k) of Section 19a. The Commission itself has said:

> "The property of a railroad which is necessary in operation may be divided into two general classes—the plant itself and its operating assets. * * * Operating assets include materials and supplies and cash on hand"—*Texas Midland Railroad, 75 I. C. C., 1, 34.*

On June 30, 1916, the date of the "valuation" made by the Commission and reported in the order of March 28, 1923, The Delaware and Hudson Company had on hand and was using for its common carrier purposes $1,332,542.44 in cash and materials and supplies on hand were worth $2,323,040.89 (*R. 20*), a total of $3,655,583.33—*R. 29.* The Commission, however, included only 60.05 per cent of this amount, or $2,195,100, in the value which it assigned to the common carrier property—*R. 29.* This diminution of value was effected by arbitrary resort to and application of a formula which the Commission claims is adapted, not to the ascertainment of the actual working capital of any common carrier, but to estimating the working capital that every common carrier ought to have. That this method was applied, with the result of reducing the amount of appellant's working capital included in the value assigned is shown by the following extract from the order of March 28, 1923:

> "The carrier owns and holds cash on hand and materials and supplies in the amount of

$3,655,583. This amount is in excess of normal requirements for working capital *as determined in the manner outlined in Appendix 3.* Under the method there explained the re-adjusted percentage for this carrier is 13.4 which applied to annual operating expenses of $16,381,569, closely approximating the trend for a period of five years prior to valuation date, results in the sum of $2,195,100, the amount necessary for the carrier's use as working capital"—*R. 29.*

In view of the foregoing it is obviously desirable to turn to Appendix 3 (*R. 230*) of the order and ascertain precisely how the Commission contrived to produce this reduction in the value assigned to carrier property. Appendix 3 is, in full, as follows:

"Analysis of Methods for Determining Working Capital. Working capital is understood to include two parts: First, the investment in a stock of material and supplies and, Second, the cash necessary to pay the operating expenses incurred for common carrier service prior to the time when the revenues from that service are available.

"Considering that the revenues from service performed in any particular period lag behind the expenses incurred for the service within that particular period, the amount of cash working capital needed for operating purposes is the amount by which the matured operating expenses exceed that part of the accrued revenues applicable to operating expenses, which has been collected, has reached the treasury and has become available for paying bills.

"It is immaterial whether this fund of working capital is provided by the owners, or secured in part on occasion through bank loans, or in part by impounding that portion of maturing revenues which is applicable as a return on the property.

"A practicable way to determine the portion of expenses for service in any period that exceeds maturing revenues from such service will be to consider that, of all operating expenses for service in any period, there will be met from maturing revenues from that service a proportion that is equal to the proportion of all accrued revenues from service within the period that reaches the treasury within that period. The remaining proportion of operating expenses will be the measure of the cash working capital actually used.

"Consideration was given to the various factors in the relation between the available revenues and the expenses within any period. Also, consideration has been given to the requirements in the way of a stock of material and supplies. The factors affecting cash working capital are as follows: The relative amount of revenue from the various classes of service; the elapsed time from the beginning of such service to the receipt in the treasury of the revenue for the service, including, for prepaid freight, the time for movement of empty cars to the point of loading, the time consumed in loading and the time the receipts are in transit to the treasury, and, for C. O. D. freight, in addition, the time for movement under load, the time consumed in unloading and the credit period for payment of charges;

the relative amount of operating expenses for various purposes; and the elapsed time from the beginning of the accrual of such respective expenses to the time when they must be paid. The factors in most cases represent the experience of all Class I carriers and in a few cases consist of specially assembled data from the experience of territorially scattered carriers that represent over forty per cent of the operating expenses of all Class I carriers. For material and supplies, consideration has been given to the average book value of the stock carried by all Class I and Class II carriers on June 30, for the years 1914-1916, and to the fact that some part of this stock is held for additions and betterments and new construction and that some part represents more or less obsolete material. Considering these facts and reducing these data to an equivalent percentage of a year's operating expenses, the result indicates that the average requirements of carriers for operating working capital, including cash on hand and investment in a stock of material and supplies, is about 13.6 per cent of a year's operating expenses. But, since operating expenses for the year ended on date of valuation may be more or less than normal, the expenses for a period usually five years, preceding date of valuation, have been taken to determine the normal annual expenses as of date of valuation.

"In determining working capital for individual roads, consideration is given, so far as data obtainable from reports on file with the Commission apply, to the difference between the factors applicable to those roads and

the average of factors applicable to all roads as a whole, as hereinbefore mentioned. These differences are in respect to the relative amount of revenues from passenger and freight service, and the average haul of freight and the ratio between empty and loaded car movement in their effect upon the elapsed time before the revenues from each class of service are in hand.

"Under the law, only such cash and material and supplies as are used for common carrier purposes may be included in the value found for common carrier property. Since the above method reveals the amount actually so used, the remainder of such assets that may happen to be in hand because of various causes other than those lying in the performance of common carrier service must be considered for the purpose of valuation as 'held for purposes other than those of a common carrier.'

"If the amount of cash and material and supplies held on date of valuation is less than the amount determined by the above method, due to assistance from affiliated companies or to other special circumstances, the carrier's common carrier property of that kind cannot, of course be greater than the amount actually on hand. In such cases, the value found for working capital is that for the cash and material and supplies.

"This method does not lend itself to the determination of working capital for switching and terminal companies, whose operations and methods of financing them are unlike the operations and revenues therefrom of line haul

carriers. Therefore, some other method will be used in such cases—*R. 230-2.*

Attention is invited to the fact that the application of the foregoing formula to appellants resulted in an allowance, as working capital, of 13.4 per cent of annual operating expenses of $16,381,569—*supra, 87.* The percentage stated in the formula is 13.6—*supra, 89.* In authorizing the Louisville and Nashville Railroad Company to issue a stock-dividend of $45,000,000, the Commission stated that that railway might "properly capitalize" the sum of $30,000,000 "for working capital, including material and supplies"—*Securities of Louisville and Nashville Railroad, 76 I. C. C., 718, 724-5.* The cited proceeding was decided on February 24, 1923. The report and opinion shows *(p. 725)*, that the average cash actually on hand, plus the average value of materials and supplies on hand, for the two-years periods ending, respectively, with December 31, and September 30, 1922, aggregated $28,119,552.11. It is also shown *(p. 724)* that the cash and materials and supplies on hand at the date of the latest balance sheet of record in the proceeding, amounted to $28,259,969.84. That is to say, in the cited case, the Commission, not using its formula and as basis for authorizing a stock dividend, sanctioned the capitalization of an amount considerably in excess of the working capital actually in hand, while in the case of appellants it refused to include in the value of their carrier property any amount greater than 60.05 per cent of the working capital which it found that they had actually on hand on the valuation date. But this is not all. Reference to the latest report on railway statistics, of the

Commission (*Thirty-sixth Annual Report on the Statistics of Railways in the United States*), containing data to the end of the calendar year 1922, shows (*p. XCI*) that the operating expenses of the Louisville and Nashville for the calendar year 1923 amounted to $109,865,090 and for the calendar year 1922 to $99,600,025. The average of these totals is $104,732,557.50. The sum of $30,000,000, authorized to be capitalized for "working capital" is 28.64 per cent of this two-years' average of operating expenses. That is to say, the Louisville and Nashville was authorized to capitalize, for the purposes of a stock-dividend, a percentage of its operating expenses more than double the percentage allowed to appellants for working capital in their "tentative valuation" and a sum that is also more than double the amount indicated by the formula which the Commission has made public and appears regularly to be using in all its "tentative valuations." No criticism of the allowance in the *Louisville and Nashville case* is intended but it is significant that in undertaking to deal practically with a practical problem, the Commission was led to a result so widely different from that which would have followed the application of its theoretical formula. If the Louisville and Nashville's problem had been treated as appellants were treated, the sum allowed the former for working capital could not have been greater than $14,034,162.70; what effect a reduction from $30,000,000 to $14,034,162.70 would have had upon the stock dividend appellants do not undertake to discover.

The formula referred to was applied in the valuation case of *Florida East Coast Railway, supra,*

over the objection of Mr. Commissioner Hall (*84 I. C. C., 25, 37*), Mr. Commissioner Aitchison (*84 I. C. C., 25, 37*), Mr. Commissioner Cox and Mr. Commissioner Potter (*84 I. C. C., 25, 48*), with the result of reducing the allowance for working capital from $1,431,947, as it had been stated in the "tentative valuation" of that railway, to $700,000 (*84 I. C. C., 25, 31-3*) and below a five-years' average of $1,063,025—*84 I. C. C., 25, 48*. The formula is not applied, however, when its use would *increase* the allowance above the amount actually provided—*Knoxville, Sevierville and Eastern Railway, 84 I. C. C., 329, 335.*

For use of this formula, see, also:

Texas Midland Railroad, 84 I. C. C., 150, 153-4;
Danville and Western Railway, 84 I. C. C., 227, 231-2;
Durham and South Carolina Railroad, 84 I. C. C., 313, 317.

This arbitrary method was newly devised when the order of March 28, 1923, was entered. Previously the Commission had included the full amounts of cash on hand and the full value of materials and supplies carried in stock in the values assigned—*Winston-Salem Southbound Railway, 75 I. C. C. 187, 190-1.* The refusal to follow the former rule in the instant case marks *a further step in the effort to depreciate railway properties.* Obviously the rule applied in this case does not have any relation to actual working capital owned or used, was not intended to have any relation to such working capital and has no tendency to discover the real amount of such capital. Its sole purpose is to substitute the judgment of the Com-

mission for the judgment of the management of the carriers and to carry into the "final values," for rate-making purposes, not the working capital actually used, but the smaller totals with the use of which the Commission considers that continued operation would be possible. And the rule allows no margin for anticipation of future needs for supplies against rising prices or any deviation from the hard and fast dimensions of an arbitrary formula blindly applied without regard to particular conditions. There should be no place under the American system of government for such an arbitrary exercise of power and such substitution of the judgment of an administrative tribunal for the judgment of the managers of property is not permitted—*Southwestern Bell Telephone Company v. Public Service Commission, 262 U. S., 276, 289; Interstate Commerce Commission v. Chicago Great Western Railway, 209 U. S., 108, 119-120.*

H. REFUSAL TO APPLY CURRENT PRICES.

In obtaining cost of reproduction new, for the purposes of "tentative valuations," it is necessary (first) to inventory the property under valuation, and (second) to apply unit prices to the various and varied units listed in the inventory.

> "When the engineering inventory is complete, it contains an enumeration of the units of all the property owned or used by the carrier for common carrier purposes, except land. In order to show cost of reproduction it is necessary to apply prices to these units"—*Ap-*

pendix 3, Texas Midland Railroad, 75 I. C. C., 1, 135.

The prices thus applied are intended to include cost of installation—*Texas Midland, 75 I. C. C., 1, 137.*

Appellants' properties were inventoried as of June 30, 1916, but the unit prices applied to these inventories are not the prices of that date nor those of the year 1916, but prices purporting to represent averages for a period of years, the duration of which is not stated, ending with June 30, 1914. It is alleged in the pleadings (*R. 9*) that *the prices thus applied were materially lower than those of June 30, 1916,* and the truth of this allegation is admitted by the motions to dismiss. It is similarly alleged and admitted that the Commission refused to apply the prices existing and current on June 30, 1916, the valuation date—*R. 9.*

The determination of the Commission to apply prices of dates other than the inventory dates except when the inventory was taken as of June 30, 1914 (it was taken as of June 30, 1916, in the instant case), was announced in the *Texas Midland* decision, as follows:

> "Our inventories are taken as of different dates, but all prices are applied as of June 30, 1914. The first thought was to apply prices as of the date of the inventory in each case, but subsequent reflection led to the conclusion that this course could not properly be pursued"—*Appendix 3, 75 I. C. C., 1, 139.*

Even in making the foregoing statement of its purpose, a purpose never modified or abandoned, the Commission recognized that there had been great increases in prices and costs of installation since 1914. The *Texas Midland* decision was rendered on July 31, 1918, and in it the Commission said:

> "The fluctuations in price which have occurred since June 30, 1914, illustrate and confirm this view. Many prices, especially of equipment, are to-day double those of 1914"—*Appendix 3, 75 I. C. C., 1, 140.*

In another valuation case before the Commission, that of the *Winston-Salem Southbound Railway Company, 75 I. C. C., 187*, decided on August 8, 1918, it was contended, on behalf of the carrier, that it had been injured by the application of 1914 prices, its inventory having been taken as of June 30, 1915. The Commission, although refusing to modify its rule that it would, invariably and regardless of the valuation date, apply the prices of 1914, recognized the fact that the prices of 1915 were materially higher than those used—*75 I. C. C., 187, 192-3.*

In a printed "Memorandum upon final value," by the late Charles A. Prouty, a former member of the Commission and its Director of Valuations in 1920, when the document was filed by him with the Commission, the following appears:

> "The cost of reproducing a railroad today would be at least seventy-five per cent more than in 1914 and the cost of equipping it would be two and one-half times as much * * *

> "* * * a value should be determined as of the valuation date of each property, applying prices of 1914 or normal prices, and to that value should be added the actual expenditures made by the carrier for additions and betterments to its property."

The concluding sentence of the foregoing obviously refers to additions and betterments subsequent to the inventory or valuation date.

The Court of Appeals of New York has said:

> "No court would receive as evidence of the value of ordinary commodities such as food stuffs and coal or even of real estate, proof of values which prevailed three years before unless it was supplemented by other evidence of the continuity of governing conditions, and common experience and observation do not sustain the belief that there has been any unusual stability during the last few years in prices entering into the cost of railroad operation which must be compensated by rates"—*People v. Public Service Commission, 215 N. Y., 241, 248.*

As the foregoing was said in a decision rendered on June 8, 1915, that is to say, a date half way between the valuation date of appellants, which was June 30, 1916, and June 30, 1914, the latest date represented in the prices used, the statement as to instability of prices is directly applicable in this case.

Moreover, the prices used, although commonly referred to by the Commission as the prices of June

30, 1914, are not the prices of that date. They do not purport to be the prices of any particular date and are not even represented to be those of any particular period of years—*R. 9.* The meagre information which has been vouchsafed to the railways in interest and to the public, concerning these prices, is indefinite and vague and their origin is surrounded by an impenetrable mist of obscurity. The Commission has said, however:

> "Unit prices, for example, are being applied as of June 30, 1914. The attempt is not to determine the exact price of a particular article on that date, for that price may have been abnormally high or low, but rather to ascertain what may be termed a normal price. For this purpose it was thought that the range of prices over a period of five years previous, and in some cases ten years, should be consulted"—*Texas Midland Railroad, Appendix 3, 75 I. C. C., 1, 136-7.*

And in the *Winston-Salem* case, *supra,* it was said that:

> "The prices employed by the Bureau of Valuation are not the exact prices which were necessarily in effect upon the precise date, June 30, 1914, but were fixed with relation to that date in such a way as to produce normal prices for periods ranging from five to ten years prior thereto"— *75 I. C. C., 187, 192.*

Still later, in the *Florida East Coast Railway case, supra,* a slightly more definite statement was made, as follows:

"In our reproduction studies we have applied unit prices based on a five-year and, for some items, ten-year span, ended June 30, 1914. The methods employed in making these studies are so fully stated in the *Texas Midland case, supra,* as to require no explanation here * * *"—*84 I. C. C., 25, 35.*

To the same effect, see:

Kansas City Southern Railway, 84 I. C. C., 113, 122;
Danville and Western Railway, 84 I. C. C., 227, 232;
Southern Railway in Mississippi, 84 I. C. C., 253, 255-6;
Knoxville, Sevierville and Eastern Railway, 84 I. C. C., 329, 330;
Durham and South Carolina Railroad, 84 I. C. C., 313, 315.

It is well-established and well known that the period 1905 to 1914, inclusive, that is to say the ten-years period thus indicated by the Commission, was a period of rising prices; so also, and in much greater degree was the period 1914 to 1916, inclusive. This is shown by data contained in *Bulletin No. 320* of the Bureau of Labor Statistics of the United States Department of Labor. The following "index numbers" of wholesale prices are taken from page 15 of that *Bulletin:*

Year	*All commodities*	*Year*	*All commodities*
1905	86	1910	101
1906	89	1911	93
1907	94	1912	99
1908	90	1913	100
1909	97	1914	98

The foregoing data show that *a ten-years' average, for a period ending with 1914, would be materially lower than the prices of 1914*, and that a five-years' average, ending with 1914, would be about the same as 1914.

The "index numbers" of wholesale prices, shown on the same page of the same *Bulletin* for 1914 to 1916, compare as follows:

Year	*All commodities*
1914	98
1915	101
1916	127

These data roughly measure the injury suffered by appellants by reason of the Commission's refusal to use the current prices of the valuation date, June 30, 1916, and its insistence upon using prices attributed to uncertain periods ending before the rapid rise began; they also illustrate and fully support the admitted allegation of appellants' petition that—

> "* * * current prices of said June 30, 1916, were materially higher than * * * the prices used by said Commission"—*R. 9.*

> "The record clearly shows that the Commission in arriving at its final figure did not accord proper, if any, weight to the greatly enhanced costs of construction in 1920 over those prevailing about 1915 and before the war, as established by uncontradicted evidence; and the company's detailed estimated cost of reproduction new, less depreciation, at 1920 prices, appears to have been wholly disre-

garded. This was erroneous"—*Bluefield Water Works and Improvement Company v. Public Service Commission of West Virginia, 262 U. S., 679, 689.*

There can no longer be any doubt that *in ascertaining cost of reproduction,* in any valuation of the property of any railway or other public utility, the use of current prices and wages of the valuation date is essential. This question seems to have been set at rest for all time by the decisions of this Court in *Southwestern Bell Telephone Company v. Public Service Commission, 262 U. S., 276; Bluefield Water Works and Improvement Company v. Public Service Commission, supra,* and *Georgia Railway and Power Company v. Railroad Commission, 262 U. S., 625.* In the case first cited it was said:

> "Obviously, the Commission undertook to value the property without according any weight to the greatly enhanced costs of material, labor, supplies, etc., over those prevailing in 1913, 1914 and 1916. As matter of common knowledge, these increases were large. Competent witnesses estimated them as forty-five to fifty per centum. * * * It is impossible to ascertain what will amount to a fair return upon properties devoted to public service without giving consideration to the cost of labor, supplies, etc., at the time the investigation is made. An honest and intelligent forecast of probable future values made upon a view of all the relevant circumstances, is essential. If the highly important element of present costs is wholly disregarded, such a forecast becomes impossible. Estimates for to-morrow cannot ignore prices of to-day"—*262 U. S., 276, 287-8.*

The so-called "tentative valuations," at issue in this proceeding, are palpably obnoxious to the foregoing rule in that they are made as of June 30, 1916; represent the properties existing on June 30, 1916 (obviously not the same as the properties of 1914), but were produced by the use of prices that were obsolete on June 30, 1916, that is average prices attributed to various and uncertain periods, none of which extends later than June 30, 1914.

THIRD.

Appellants would be substantially injured if the order of March 28, 1923, should be permitted to operate as a "tentative valuation" in the further process prescribed by the Valuation Act.

Considering the averments of appellants' petition, and the foregoing discussion, it must be apparent that *if the order of March 28, 1923, now in issue, is a valid order* and sufficiently meets the requirements of the Valuation Act, so that it can stand and serve as a "tentative valuation," *the power of the Commission to call anything which it chooses a "tentative valuation" is complete and boundless.* In other words, the alternative to holding that the order of March 28, 1923, is illegal and ineffective to establish a "tentative valuation" is to hold that, without inquiry or consideration, the Commission has power to declare that a certain figure, or assemblage of data, make up a "tentative valuation," which by the terms of the Act would become a "final valuation" if not

protested and, if protested, must be overcome by evidence or stand as established. Such a conclusion would leave the carefully phrased definitions of the Act as ineffective as though they did not exist would read out of the Act much that Congress made a part of it, and would largely destroy the value of the right of protest, secured to the public as well as to the carrier. It would render the effort of Congress to define and prescribe the process of valuation nugatory and vain.

A. APPELLANTS ARE ENTITLED TO A LAWFUL "TENTATIVE VALUATION" AS THE STATUTORY FOUNDATION FOR FURTHER PROCEEDINGS IN THE STATUTORY PROCESS OF VALUATION BY THE COMMISSION.

More fully stated, the foregoing proposition amounts to this, that (*a*) the term "tentative valuation" is defined by Section 19a; (*b*) the Commission cannot make anything a "tentative valuation" that departs substantially from the statutory definition; (*c*) if the law is obeyed in matters of form and substance, the preparation of the "tentative valuation" is otherwise entirely controlled by the Commission; (*d*) a lawful "tentative valuation" marks the completion of an *ex parte* proceeding and opens the door for an *inter-party* proceeding; (*e*) this inter-party proceeding is, or may be, begun by a protest and in it the "tentative valuation" imposes upon the protestant the burden of proof to show that it ought to be altered; (*f*) Congress intended that all protestants (the public as well as the carrier may protest) should have all the matters set

forth in the statutory definition of a "tentative valuation" for their protection in this *inter-party* proceeding, and (*g*) appellants, having been denied a lawful "tentative valuation," will be greatly at disadvantage if the *inter-party* proceeding is allowed to go forward upon the order of March 28, 1923, or before a lawful "tentative valuation" has been made, and they have had the full statutory opportunity to base a protest thereon.

Paragraph XIX (*R. 11-2*) of appellants' petition shows that on account of the insufficiency of the order of March 28, 1923, they were "not sufficiently advised * * * to protect their rights by an adequate and proper and sufficiently full and detailed protest."

If it complies with the statutory definition the formulation of a "tentative valuation" is wholly within the control of the Commission. It is entitled to the assistance of the carriers, which they may not refuse (*Section* 19a, *paragraph e, R. 4*) but the Commission need not accept; in practice carrier co-operation has been welcomed up to a certain point and rejected beyond that point, sought in certain matters and rigidly excluded in others. But whatever official policy may dictate, the process is always within the breast of the Commission; within the law, its unrestricted will controls at every moment and at every point. The law does not establish, at any point in this stage, a right to be heard, to confront or to cross-examine any witness, to object to the competency of evidence or even to know what evidence is to be considered; there is no record. Every such opportunity and

right is postponed to the second stage of the process of valuation.

Ultimately there may emerge from this *ex parte* process a "tentative valuation." If it complies substantially with the Congressional will, as expressed in the statutory definition, it produces the statutory results and no inquiry can be made as to what preceded it or how it was formulated or its results obtained. That is to say, no inquiry can be made which attempts to go behind the showing of a lawful "tentative valuation." But, if it is a lawful "tentative valuation" it will fully show the answers to many inquiries upon its face. These answers will be found in the various analyses and reasons specified and called for by the statute, and in the absence of these analyses and reasons it would plainly seem that nothing could meet the statutory definition or be a "tentative valuation," for the purposes of the law.

When a lawful "tentative valuation" emerges it must be served upon many public authorities and upon the corporations in interest—*R. 4.* Each public authority and every corporation in interest must be allowed thirty days in which to protest against such "tentative valuation" and such protest, from any source, requires an hearing and full opportunity to show that, in the respects pointed out by the protest, it ought to be changed before being made a "final valuation." If no protest is filed, either by any public authority or by any corporation in interest, within the time allowed, the "tentative valuation" ripens into a "final valuation"—*Section 19a, paragraph* (h) *R. 4.*

If any protest is filed, from any quarter, a hearing *on the protest* must be held, but only matters *relevant to the protest* may be heard. Matters not protested are settled by the "tentative valuation" itself and require no proof; matters as to which protest is made are apparently determined by the "tentative valuation" unless it is overcome by evidence.

> "If notice of protest is filed the Commission shall * * * hear and consider any matter relative and material thereto which may be presented in support of any such protest * * *"—*Section* 19a, *paragraph* (*i*), *R. 4-5.*

The result of such a hearing, provided for in the statute, is the determination by the Commission of a "final valuation." The Commission may conclude to make the "tentative valuation" the "final valuation," or it may make a "final valuation" different from the "tentative valuation," but *it does not, in any case, make a new "tentative valuation."* No protest, from any source, has any effect upon any "tentative valuation," as such.

> "If after hearing any protest * * * the Commission shall be of opinion that its valuation should not become final, it shall make such changes as may be necessary, and shall issue an order making such corrected tentative valuation final as of the date thereof"—*Section* 19a, *paragraph* (*i*), *R. 4-5.*

The filing of protest by appellants could, therefore, avail them nothing towards obtaining the lawful "tentative valuation" to which they are entitled,

which Congress intended they should have and without which their substantial property rights cannot adequately be protected. They have no means of enforcing their right to a lawful "tentative valuation" save this proceeding.

The purpose of Congress in providing for a "tentative valuation," as the foundation for a subsequent *inter-party* proceeding intended to complete the process of valuation by the Commission, is very evident. It must have been considered that to require the whole work of valuation to be performed in accordance with the general rule that administrative bodies must act upon a record and the parties in interest have opportunity to cross-examine witnesses would be undesirably cumbersome. But Congress was confronted with the rule, and *if it could accomplish the end in view in any manner,* the method adopted must, to satisfy the minimum requirements of justice and those of the Constitution as well, secure to the parties affected a sufficient substitute. If the "tentative valuation" could be made to take the place of a record establishing equivalent results by competent testimony, and to justify shifting the burden of proof to the carrier, it could be only by defining it in such a way that its content would always safeguard the parties in interest, the public as well as the carrier, against any consequent and material disadvantage. And the definition would be of no avail unless it became enforceable.

Appellants consider that Congress intended to make the "tentative valuation" *prima facie* evidence in the subsequent proceedings leading to a "final valuation." It is recognized that the term

is not so applied in the statute and the District Court concluded otherwise, holding that it is—

> "* * * without any probative effect *per se*"—*R. 257.*

Such, however, is clearly not the view of the Commission for in the recent valuation case of the *Durham and South Carolina Railroad, supra,* decided on July 14, 1924, it was held, by the Commission, that the "tentative valuation" must be overborne by the clear weight of evidence or it must prevail. The following is from the decision in that case:

> "Under the provisions of the Act it is contemplated that to warrant correction of our tentative valuation carriers shall offer evidence of such character as will indicate clearly that an error has been made"—*84 I. C. C., 313, 314.*

And it will be shown elsewhere herein (*infra, 118-152, 190-205*), that, in practice, in valuation proceedings, and in many other proceedings before the Commission, "tentative valuations" are accepted as proof of the matters they contain, even in the face of considerable testimony tending to establish the contrary. It is indeed difficult to agree with the District Court, which seems to have considered as a mere "pleading," an elaborate and formal order of the Commission, every averment of which must, in accordance with the express terms of the statute, stand as established unless protested, and if protested must stand unless affirmative proof of error is introduced. And this is especially true, when it is considered, also, that the body that must be

convinced of error is the same body which will be required formally to admit that it committed error.

By the Valuation Act, the initiative in valuation was placed with the Commission, an initiative that ordinarily carries with it the burden of affirmative proof. The right to require this proof according to the ordinary forms and rules of evidence was taken from the carriers, and Congress sought to set up an equivalent in a meticulously defined "tentative valuation." This right, which was to be replaced by an equivalent in the statutory metes and bounds of the "tentative valuation," is substantial. The right to have the other side prove its case is always a substantial right although the legislature may, when it does not act unreasonably or arbitrarily, modify the rules of evidence, shift the burden of proof, make one fact *prima facie* evidence of another and establish presumptions.

Adams v. New York, 192 U. S., 585, 588;
Mobile, Jackson and Kansas City Railroad v. Turnipseed, 219 U. S., 35, 42;
Bailey v. Alabama, 219 U. S., 219;
McFarland v. American Sugar Refining Company, 241 U. S., 79;
Hawes v. Georgia, 258 U. S., 1, 4-5;
St. Louis Southwestern Railway v. Interstate Commerce Commission, 264 U. S., 64, 77;
Boswell v. Pannell, 107 Texas, 433, 438;
Parrish v. Sun Publishing Association, 6 N. Y. App. Div., 585, 587;
Hurd v. Wing, 56 N. Y., App. Div., 595, 598;

People v. Public Service Commission, 159 N. Y. App. Div., 546, 551, 555; affirmed 215 N. Y., 241; see page 253;
Heineman v. Heard, 62 N. Y., 448, 456;
Conselyea v. Swift, 103 N. Y., 604, 606;
Lake Ontario National Bank v. Judson, 122 N. Y., 278, 282;
Whitlock v. Fidelity and Casualty Company, 149 N. Y., 45.

"The rule as to the burden of proof is important and indispensable in the administration of justice, and constitutes a substantial right of the party upon whose adversary the burden rests. It should, therefore, be jealously guarded and rigidly enforced by the courts"—*Article "Evidence"—22 C. J., 69-70.*

Whatever Congress might have done, without impairing the Constitutional rights of appellants, in making any finding of the Commission in regard to value *prima facie* evidence in subsequent proceedings either before the Commission or elsewhere leading to the determination of value, what Congress actually did do was very carefully to describe, define and limit the character of the Commission's inquiry and the substantial character and content of its "tentative valuations." In seeking to hold the Commission to the statutory definition, appellants' sufficient basis of right is found in the statute itself—*St. Louis Southwestern Railway v. Interstate Commerce Commission, 264 U. S., 64, 67.*

And the right to a full record in proceedings before the Interstate Commerce Commission is established by a multitude of decisions. The following

is from the decision in *Interstate Commerce Commission v. Louisville and Nashville Railroad, 227 U. S., 88*:

> "In such case it insisted that the order based on such opinion is conclusive, and (though *Interstate Commerce Commission v. Union P. R. Co., 222 U. S., 547, 56 L. Ed., 311, 32 Sup. Ct. Rep, 108,* was to the contrary) could not be set aside, even if the finding was wholly without substantial evidence to support it.
>
> "1. But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.
>
> "In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, *quasi*-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to

the 'indisputable character of the evidence' (*Tang Tun v. Edsell, 223 U. S., 681, 56 L. ed., 610, 32 Sup. Ct. Rep., 359; Chin Yow v. U. S., 208 U. S., 13, 52 L. ed., 370, 28 Sup. Ct. Rep., 201; Low Wah Suey v. Backus, 225 U. S., 468, 56 L. ed., 1167, 32 Sup. Ct. Rep., 734; Zakonaite v. Wolf, 226 U. S., 272, Ante, 218, 33 Sup. Ct. Rep., 31*), or if the facts found do not, as a matter of law, support the order made *United States v. Baltimore & O. S. W. R. Co., 226 U. S., 14, ante, 104, 33 Sup. Ct. Rep., 5, Cf. Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S., 20, 51 L. ed., 942, 27 Sup. Ct. Rep., 585; Wisconsin M. & P. R. Co. v. Jacobson, 179 U. S., 301, 45 L. ed., 201, 21 Sup. Ct. Rep., 115; Washington ex rel., Oregon R. & Nav. Co. v. Fairchild 224 U. S., 510, 56 L. ed., 863, 32 Sup. Ct. Rep., 535; Interstate Commerce Commission v. Illinois C. R. Co., 215 U. S., 470, 54 L. ed., 287, 30 Sup. Ct. Rep., 155; Southern P. Co. v. Interstate Commerce Commission, 219 U. S., 433, 55 L. ed., 283, 31 Sup. Ct. Rep., 288; Muser v. Magone, 155 U. S., 247, 39 L. ed., 137, 15 Sup. Ct. Rep.,* 77 * * *.

"3. Under the statute the carrier retains the primary right to make rates, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of just for unjust charges. The Commission's right to act depends upon the existence of this fact, and if there was no evidence to show that the rates were unreasonable there was no jurisdiction to make the order. *Interstate Commerce Com-*

mission v. Northern P. R. Co., 216 U. S., 544, 54 L. ed., 609, 30 Sup. Ct. Rep., 417. In a case like the present the courts will not review the Commission's conclusions of fact (*Interstate Commerce Commission v. Delaware L. & W. R. Co., 220 U. S., 251, 55 L. ed., 456, 31 Sup. Ct. Rep., 392*), by passing upon the credibility of witnesses or conflicts in the testimony. But the legal effect of evidence is a question of law. A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law, and must, in the language of the statute, be 'set aside by a court of competent jurisdiction.' *36 Stat. at L., 551, chap. 309.*

"4. The government further insists that the Commerce Act (*26 Stat. at L., 743, chap. 128, U. S. Comp. Stat., 1901, page 3163*), requires the Commission to obtain information necessary to enable it to perform the duties and carry out the objects for which it was created; and having been given legislative power to make rates it can act, as could Congress, on such information, and therefore its findings must be presumed to have been supported by such information, even though not formally proved at the hearing. But such a construction would nullify the right to a hearing,—for manifestly there is no hearing when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain, or refute. * * * But the more liberal the practice in admitting testimony the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such

cases, the Commissioners cannot act upon their own information, as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown, but presumptively sufficient information to support the finding. *United States v. Baltimore & O. S. W. R. Co., 226 U. S., 14 ante, 104, 33 Sup. Ct. Rep., 5"—227 U. S., 88, 91-4.*

To the same effect, see:

Louisville & Nashville v. Interstate Commerce Commission, 195 Fed., 541, 564;
United States v. Baltimore & Ohio Railroad, 225 U. S., 306, 323-4;
United States v. Baltimore & Ohio Southwestern Railroad, 226 U. S., 14, 20;
Florida East Coast Railway v. United States, 234 U. S., 167, 185-6;
Kwock Jan Fat v. White, 253 U. S., 454, 463-4;
United States v. Abilene Southern Railway, 265 U. S., 274, 288;
Saratoga Springs v. Saratoga Gas, Electric and Power Company, 191 N. Y., 123, 148.

It is of course true that "every statute to some extent requires construction by the public officers whose duties may be defined therein," but this does not permit them to construe statutory limitations or legislative mandates out of existence or to evade the performance of duties plainly prescribed by law—*Roberts v. United States, 176 U. S., 221, 231; Work v. United States, 262 U. S., 200, 208-9.*

When the law defines the duties of an administrative agency "it is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action." It was so held in *Wichita Railroad & Light Company v. Public Utilities Commission of Kansas, et al., 260 U. S., 48,* decided on November 13, 1922. In that case it appeared that the Public Utility law of Kansas provided that an order granting increased rates for gas supply might supersede lower rates fixed by contract, but required an express finding by the Commission, after hearing, that the existing rates were unjust. The order of the Commission was set aside because this requirement had not been complied with. The opinion by Mr. Chief Justice Taft, says:

> "* * * The power is expressly made to depend on the condition that after full hearing and investigation the Commission shall find existing rates to be unjust, unreasonable, unjustly discriminatory or unduly preferential. We conclude that a valid order of the Commission under the act must contain a finding of fact after hearing and investigation, upon

which the order is founded, and that for lack of such a finding, the order in this case was void.

"This conclusion accords with the construction put upon similar statutes in other States. *Public Utilities Commission v. Springfield Gas & Electric Co., 291 Ill., 209; Public Utilities Commission v. Baltimore & Ohio Southwestern R. R. Co., 281 Ill., 405.* Moreover, it accords with general principles of constitutional government. The maxim that a legislature may not delegate legislative power has some qualifications, as in the creation of municipalities, and also in the creation of administrative boards to apply to the myriad details of rate schedules the regulatory police power of the State. The latter qualification is made necessary in order that the legislative power may be effectively exercised. In creating such an administrative agency the legislature, *to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function.* It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and *show a substantial compliance therewith to give validity to its action.* When, therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective.

"It is pressed on us that the lack of an express finding may be supplied by implication

and by reference to the averments of the petition invoking the action of the Commission. We can not agree to this. It is doubtful whether the facts averred in the petition were sufficient to justify a finding that the contract rates were unreasonably low; but we do not find it necessary to answer this question. We rest our decision on the principle that an express finding of unreasonableness by the Commission was indispensable under the statutes of the State"—*260 U. S., 48, 58-9.*

Successive decisions by the Commerce Court (*190 Fed., 591 and 203 Fed., 56*), in a single case affecting the *Atchison, Topeka and Santa Fe Railway,* illustrate and apply this principle. In the first decision it appeared that the Interstate Commerce Commission had ordered a reduction in rates on lemons without first finding the jurisdictional fact that the rate complained of was unreasonable. The Commerce Court set aside the order, without prejudice to further proceedings before the Commission. The second decision shows that, subsequent to the first, such further proceedings were had before the Commission which thereupon found the requisite jurisdictional fact and, upon this later record, the court sustained the Commission —*203 Fed., 56, 57.*

See also, *Interstate Commerce Commission v. Goodrich Transit Company, 224 U. S., 194, 214-5.*

B. IN THE DETERMINATION OF "FINAL VALUATIONS," IN PROCEEDINGS UPON PROTESTS TO "TENTATIVE VALUATIONS," THE INTERSTATE COMMERCE COMMISSION CONSISTENTLY TREATS THE LATTER AS HAVING EVIDENTIARY FORCE BEYOND THAT ORDINARILY ATTRIBUTED TO MERE *PRIMA FACIE* EVIDENCE.

The *Texas Midland case, supra,* was the first in which a report and opinion was rendered by the Commission in any proceeding upon a protest to a "tentative valuation." A joint protest had been filed by the Governor of Texas and the Railroad Commission of that State; the carrier had protested; the National Association of Railway and Utilities Commissioners, Minnesota Railroad and Warehouse Commission, Public Utilities Commission of Kansas, Railroad Commission of Texas, Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors, Brotherhood of Railroad Trainmen and Western Union Telegraph Company had been represented in the hearings; decision was rendered on July 31, 1918.

The first protested item in the "tentative valuation" to receive consideration in the report and opinion was the allowance, under "cost of reproduction new" for clearing 353.63 acres of land. The "tentative valuation" had fixed this item at $8,841, applying a rate of $25.00 per acre; the carrier claimed that this was too low and proposed $35.00 per acre, in its protest, as the figure to be substituted. At the hearing, the carrier produced testimony in support of this contention. The issue thus developed was determined by treating

the "tentative valuation" as having probative force sufficient to overcome all this testimony. The whole discussion of this item, in the report and opinion, is as follows:

> "The carrier contends that the unit prices allowed are too low. Below are given the prices which the carrier in its protest claims should be fixed:
>
> "Clearing ..... per acre $35.00
> ....
>
> "The carrier introduced testimony purporting to show that the clearing necessary in a theoretical reproduction would cost $40.00 an acre. * * * The manager of the carrier testified that he thought $27.50 to $30.00 per acre would cover the cost of clearing. * * *
>
> "The $25.00 for clearing was arrived at after the consideration of contracts for work of this character which had been performed in the vicinity and nothing has been submitted in this record to show that it is unreasonably low. In fact, the opinion of the manager of the carrier, who has been with the property since it was built, that $27.50 to $30.00 should be allowed, may be said to support the price used when it is borne in mind that his testimony was opinion testimony unsupported by prices actually paid for similar work, and that his interest in the property might naturally influence his opinion so as to secure an amount which would beyond question fully recompense the carrier. The unit price of $25.00 per acre for clearing is established"—*75 I. C. C., 1, 38.*

In the same "tentative valuation" fifteen cents per cubic yard was applied to 662,673 cubic yards of earth excavation, resulting in an item of $99,401 in the total determined for "cost of reproduction new"—*75, I. C. C., 1, 37.* This item was protested by the carrier which suggested eighteen cents (*75, I. C. C., 1, 38*) which would have raised the item twenty per cent to $119,281. Sustaining the lower figure, the Commission said, in part:

> "The testimony of the carrier was submitted by three contractors and three railroad engineers. The testimony of all these witnesses was practically the same to the effect that from seventeen to nineteen cents per cubic yard would be a fair price for the earth excavation and embankment necessary in a theoretical reproduction of the road. The testimony was confined to expressions of opinion as to the proper price, and was practically unsupported, although one engineer submitted figures showing the cost of work in changing the alignment and grade of a railroad already constructed. * * *
>
> "* * * There is nothing of record which would justify a change in the price of fifteen cents per cubic yard for excavation"—*75, I. C. C., 1, 39-40.*

The reference to "embankment," in the foregoing, will be noted. The "tentative valuation" then before the Commission allowed thirteen and one-half cents per cubic yard for 1,855,449 (1,686,817 plus ten per cent or 168,682 for shrinkage) cubic yards, resulting in an item of $250,492 in the total for cost of reproduction new—*75 I. C. C., 1, 37.* The

carrier claimed eighteen cents (*75 I. C. C., 1, 38*), or $333,990. The reference in the report and opinion to the testimony of three witnesses who favored "seventeen to nineteen cents" for embankment, as well as for excavation, has already been quoted—*supra, 120.* It does not appear that any other testimony was received. Yet the Commission accepted the "tentative valuation" figures, saying, in part:

> "The contention is made that there is no warrant for a difference in price for excavation and embankment. When the field work in this case was completed, our engineer reached a price of fifteen cents for embankment. The quantity to which this price was applied was limited to the exact measurements of embankments. It is well known that in order to make an embankment of specified dimensions, it is necessary to place in that embankment a certain amount of additional earth for shrinkage. * * * However, after conference between officials of the Bureau*, it was decided that the best way to treat this matter was to compensate for shrinkage in the quantities. This procedure contemplates the addition of a certain amount to the quantities which are found in the embankment after measurement. Ten per cent was arrived at, as a proper percentage to allow for such shrinkage. After it was decided to adopt this method it was necessary, in order to avoid duplication, to reduce the price ap-

*Presumably the Bureau of Valuation, in the office of the Interstate Commerce Commission.

> plied by ten per cent. This resulted in a price of thirteen and one-half cents per cubic yard for embankment * * * From the facts of record we are of the opinion that the price of thirteen and one-half cents per cubic yard employed for the exact quantities found in embankments, increased by ten per cent to take care of shrinkage, will do full justice"—*75 I. C. C., 1, 40.*

The fourth item protested and discussed amounted to $49,862, being the total of allowances for difficult excavation at rates of sixty-five, thirty-five and twenty-four cents per cubic yard, for solid rock, loose rock and hardpan respectively—*75, I. C. C., 1, 37.* The carrier claimed ninety-seven and forty-three cents, for solid and loose rock, respectively, but does not appear to have suggested a figure for hardpan—*75 I. C. C., 1, 38.* The Commission accepted the "tentative value" figures, merely saying:

> "The same character of evidence was introduced by the carrier with respect to loose-rock excavation, solid-rock formation, and hardpan. There is nothing of record, however, which would warrant a change in the prices found" —*75 I. C. C., 1, 40.*

Account No. 6, bridges, trestles and culverts, was fixed at $387,792 in the "tentative valuation" and the protest claimed $532,222. The carrier's evidence was held insufficient to overcome the "tentative valuation"—*75 I. C. C., 1, 41-2.*

Account No. 8, ties, was increased over the "tentative valuation," the first discussed in the

report and opinion to receive such treatment. This, however, was apparently upon the recommendation of the Bureau of Valuation, not, it would seem, because of the evidence produced by the carrier. The Commission said:

> "The Bureau is convinced that the price of fifty-six cents per tie which was applied is too low and recommends that it be increased to sixty-nine cents per tie. The cost of reproduction new of ties wholly owned and used will be increased. * * *"—*75 I. C. C., 1, 42.*

The foregoing extracts, and the whole tenor of the report and opinion from which they have been taken, seem almost inevitably to lead to conviction that the "tentative valuation" is practically regarded, in the proceedings of the Commission in hearings upon protests, as substantially conclusive proof of the matters it contains, unless it becomes possible to convince representatives of the Bureau of Valuation that it should be modified. It is patent, that in any hearing upon a protest to a "tentative valuation" the Commission is reviewing its own work; an order of its own based upon prolonged inquiry, which has involved heavy expenditures out of its funds provided by Congressional appropriation and the labors of many important subordinates whom it has selected and employed. Measurably, the Commission is, in such proceedings, a body of judges sitting upon a cause that is their own. This is so evident as to explain some degree of inclination to sustain the order in issue in such a proceeding and, likewise, to point to one of the reasons that must be assumed to have im-

pelled the Congress strictly to define the "tentative valuation" which it provided should become the basis of such a proceeding.

In the *Kansas City Southern case, 75 I. C. C., 223,* the figures of the "tentative valuation" were accepted, as to the engineering expenses, under the conditions indicated below:

> "The Bureau has computed engineering on the basis of four per cent of the total amount shown as the cost of reproduction new of the road accounts exclusive of account No. 1, engineering, and account No. 2, land for transportation purposes. The carrier claims that this percentage is too low and should be increased to 4.566 per cent, which is the relation of the amount actually expended for engineering in original construction to the amount expended for road items. * * * The four per cent which has been used in this case reflects the judgment of the member of the engineering board and after consideration we are of the opinion that his estimate should stand"—*75 I. C. C., 223, 253.*

In the *San Pedro, Los Angeles and Salt Lake valuation case, 75 I. C. C., 463,* on protest to a "tentative valuation," the carrier sought to have the amount reported as "cost of equipment" increased by "amounts expended for additions and betterments that were said to have been charged from time to time to operating expenses." The Commission's opinion shows that testimony in support of this claim was produced by the carrier

and it does not appear that any evidence in support of the "tentative valuation" was introduced. The "tentative valuation" figure was, however, sustained, the Commission saying:

> "The testimony submitted to support this contention shows that numerous estimates of the cost of additions and betterments were resorted to and that in some instances actual costs were determined from the expense accounts. This evidence upon the whole is wanting in the clearness and definiteness required to establish the propriety of a revision of the character proposed in the carrier's accounts. We adhere to the statement of investment in equipment as made in the tentative valuation" —*75 I. C. C., 463, 474.*

The length of the construction period allowed in a "tentative valuation" for the purpose of determining "cost of reproduction new," is "of importance in determining interest during construction"—*Kansas City Southern case, 75 I. C. C., 223, 257.* In the *San Pedro, Los Angeles and Salt Lake case, supra,* the carrier's contention was that the period of construction adopted in the "tentative valuation" was too short and "impracticable." The Commission sustained the "tentative valuation," stating the carrier's position and its own as follows:

> "The carrier protests that the program of reproduction which was adopted as a basis for estimating the cost of reproduction new was defective in that it did not provide for the

> most economical method of constructing the property. An effort was made to show that in certain particulars the contemplated program was impracticable. The carrier contends that the program assumed did not select the best locations for material yards and did not include in the unit cost for a large number of the different kinds of material a sufficient amount for costs of transportation. We have carefully examined the testimony relating to the practicability of the program of reconstruction that our engineers have adhered to. *Whether or not it was the best possible program that could have been adopted we need not decide. For the purpose of estimating the cost of reproduction of the carrier's property in this case we approve it*"—*75 I. C. C., 463, 474-5,* Italics ours.

In the cited case, also, changes favorable to the carrier were made, from the "tentative valuation," upon the recommendation of the Bureau of Valuation, in one instance the Land Section of that Bureau. The opinion of the majority refers to these changes as follows:

> "At the hearing representatives of the land section agreed to certain increases in the unit prices of land, in zones 10, 11 and 13, of valuation section 18, which we approve" —*75 I. C. C., 463, 497.*

Mr. Commissioner Potter, in a separate opinion, "concurring in part," expressing his conclusion that the "final value is too low" (*75 I. C. C., 463, 567*), declared, in substance, that the majority of the Commission had done precisely what it is

now argued that it constantly does do, namely, attributed extraordinary probative force to the work of its Bureau of Valuation. He said (Mr. Commissioner Cox concurring with him):

> "It seems to me clear from the report that the conclusion at which we arrive was not a conclusion based on all the testimony, but was a conclusion arrived at after excluding from consideration important testimony which was entitled to have weight, and if given weight must have so affected the result as to substantially increase the values beyond those which our appraisers found. * * * *When at the hearing one of our own appraisers suggested a change, we promptly adopted it, seemingly for no reason except that he had made it.* We should not conclude that the men whom we selected were infallible. Perhaps our Bureau selected low-value men"—*75 I. C. C., 463, 575.*

The importance of the foregoing is made clear when it is noted that the final valuation of this carrier states the value of its owned carrier lands as $4,156,227.36 and that of its owned non-carrier lands as $3,369,647.94 (*75 I. C. C., 463, 607*), a total of $7,525,875.30. The difference between the claims of the carrier as to the value of lands in Valuation Section 1, only one of the twenty valuation sections as to which land values were determined, was $8,038,950, the carrier claiming $10,647,081 and the "tentative valuation" allowing $2,608,131. In two other valuation sections the carrier claimed $4,307,860 and the "tentative valuation" allowed $3,092,155,

a difference of $1,215,705. What the differences were in other valuation sections does not appear in the report and opinion (*75 I. C. C., 463, 490, 496*) but the total for these three sections is $9,254,655. Mr. Commissioner Potter states, in the separate opinion above quoted (*supra,—*), that in only "one lone instance" was a figure higher than that of the Bureau of Valuation accepted for the "final valuation" and that in that instance the advance allowed was from $8,297 to $9,197.20. His observation merits quotation:

> "The fact that in the one lone instance, in valuing the Vandybarker ranch, we accepted the carrier's higher value of $9,197.20, instead of our own of $8,297, does not prove that in all cases due weight was given to the carrier's testimony. It is likely that our men were wrong with respect to properties where larger amounts were involved"—*75 I. C. C., 463, 575.*

The protest of the Atlanta Birmingham and Atlantic Railroad Company (*75 I. C. C., 645*) in respect of the application of the rate fixed for interest during construction seems to have been overruled without any evidence supporting the "tentative valuation." The report and opinion says:

> "The Bureau of Valuation calculated interest on the road accounts, except land, for one-half the construction period of a particular section plus three months; on general expenditures, except interest during construction, for one-half the construction period plus three months; and on equipment, for a period of three months.

"With respect to each of these items the carrier insists that the period is too short, and considerable evidence to sustain its contention was introduced.

"Considering the evidence of record, we are of opinion and find that the methods adopted with respect to calculation of interest are reasonable and just and they are approved"—*75 I. C. C., 645, 659.*

In the *Florida East Coast Railway valuation case, 84 I. C. C., 25,* the "tentative valuation" had fixed $45,500,000 as the value of "the railroad property, separated from working capital then on hand" (*84 I. C. C., 25, 35*), and had included $1,431,947 in the "final single sum value" for working capital, making a total of $46,931,947—*84 I. C. C., 25, 26.* Florida East Coast Railway Company, Atlantic and East Coast Terminal Company and Atlantic Coast Line Railroad Company filed protests within the statutory period and hearing was held—*84 I. C. C., 25.* The Commission made no change in the total of $45,500,000, which was protested, but *reduced* the amount assigned for working capital to $700,000, declaring the single-sum value in the final valuation as $46,200,000—*84 I. C. C., 25, 32, 37. Every protested item was determined against the carrier.*

The final paragraph, of the report and opinion of the majority of the Commission, in the *Ann Arbor Railroad valuation case* (*84 I. C. C., 159*) *rejects every item in the carrier's protest* and contains the following:

"We have carefully reviewed all the matters presented by the carrier in support of its

protest and are unable to find therein any justification for modifying the valuations as reported in the tentative report"—*84 I. C. C., 159, 170.*

The foregoing is especially remarkable in that the eleven pages of the report by which it is preceded contain *no reference to any testimony of any character in support of the "tentative valuation" but do contain abundant references to testimony in support of the protest.* The following extracts from the report and opinion of the majority are typical:

"The amount stated in the tentative valuation for engineering was figured at 4.25 per cent. * * * The carrier claims five per cent for this item based principally upon the testimony of its former chief engineer. * * * No change will be made in the amounts stated for engineering in the tentative valuation"—*84 I. C. C., 159, 160.*

"The tentative valuation allows $1,763,581 in cost of reproduction new for grading. * * * The carrier protests * * * and * * * claims the total allowance under this account should be * * * increased to $2,405,611. * * *

"Two witnesses testified * * * for * * * the carrier. * * *

"There is nothing in the evidence introduced by the carrier which would indicate that the unit prices for grading used in the tentative valuation are insufficient and they are approved"—*84 I. C. C., 159, 160-1.*

"The carrier claims an allowance of $593,384 for gravel ballast. * * * The tentative valuation allowed $425,472. * * * The carrier's witness stated that this matter had been fully presented to our engineers in an informal consideration of the engineering report. *We see no reason for displacing the judgment of our engineers* * * * and the unit price for ballast as contained in the tentative valuation is approved"—*84 I. C. C., 159, 162,* Italics ours.

"The carrier's claim is based upon the testimony of its chief engineer. * * *

"Another witness for the carrier testified. * * *

"All of the information prepared by the subcommittee referred to was submitted to our Bureau of Valuation in detail and the formula referred to was reviewed by our engineers. * * * The evidence offered by the carrier is not convincing that the allowance in the tentative valuation for tracklaying and surfacing is insufficient"—*84 I. C. C., 159, 163.*

"The tentative valuation allowed $112,194 for general expenditures. * * * The carrier claims $393,009. * * * This claim is fortified by the opinion of two witnesses. * * *

"* * * Nothing that is offered by the carrier would lead us to believe that the method there outlined is not correct or that the amount produced by the application of the percentage determined upon in this case is less than a fair and reasonable allowance for general expenditures"—*84 I. C. C., 159, 163.*

"The tentative valuation includes an allowance of $742,680 for interest during construction. This amount is based upon a construction period of two and one- half years. * * * The carrier claims $1,288,687 based upon a construction period of four years and the inclusion of interest during that period for account 2, 'Land.' The carrier's claim was supported by the testimony of two witnesses.* * *

"* * * Nothing in this record indicates that the methods therein stated or the results reached thereby are inaccurate or other than fair and reasonable"—*84 I. C. C., 159, 163-4.*

"The carrier claims that cost of reproduction new in the tentative valuation should be increased by an amount of $2,723,911 to cover cost of development. As a basis of this claim the carrier offered in evidence. * * *

"In further support of its claim the carrier introduced an exhibit. * * *

"The carriers claim for development cost cannot be allowed"—*84 I. C. C., 159, 164-5.*

"The carrier has protested the methods, rules and principles used in determining the amount of depreciation of the carrier's property. The testimony of two witnesses was offered in support of the protest. * * *

"We are not convinced by anything in this record that the results reached by the application of the methods and principles there approved* are not fair and proper"—*84 I. C. C., 159, 166.*

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*That is, approved in the *Texas Midland case, supra,* decided on July 31, 1918; the cited case was decided on July 5, 1924.

"The carrier claims that the amount shown in the tentative valuation for investment in road and equipment should be increased by $2,858,651.71. * * * In support of this claim the carrier introduced one exhibit * * * It was testified[1] * * * The former chief engineer of the carrier appeared as a witness. * * *

"The claim of the carrier in this connection is not supported by the record and will not be allowed"—*84 I. C. C., 159, 167-8.*

"* * * the tentative valuation included an allowance of $233,754 on account of working capital. * * * In its protest the carrier claimed * * * $627,421. * * *

"In this instance the figure reported in the tentative valuation represents a fair allowance considering the extent of the carrier's property and its average operating resources and expenses and we see no reason for changing the tentative report in respect of working capital" —*84 I. C. C., 159, 169.*

The elisions from the foregoing series of extracts include unessential words and summaries of the carriers' testimony and contentions. Nothing has been omitted that could suggest that any testimony in support of the "tenative valuation" was considered or received. The omission of the summaries of testimony does not seem to be of any account for, *whatever the testimony and whatever the question in controversy, the result was invariably the same, the "tentative valuation" was always sustained.* The extracts cover every contested item

[1]In favor of the carriers claim, as the context shows.

and every contested item was, as they show, resolved in favor of the "tentative valuation" and the Bureau of Valuation. The inescapable conclusion is that the Commission, the creator of every "tentative valuation," regards its creature as invariably immaculate and impregnable.

The Danville and Western Railway Company (*84 I. C. C., 227*) protested against its "tentative valuation" and produced testimony in support of its protest (*84 I. C. C., 227, 8*), with the result that every protested item but one was determined against the protestant and the allowance of working capital, which had not been protested, was cut down from $94,847 to $28,000, with a reduction in the single-sum value from $1,978,347 to $1,913,000. An increase of $1,268 in "cost of reproduction less depreciation," this being the single item decided for the carrier, seems to be represented in the last figure by an addition of $1,500 ($1,978,347 minus $66,847—the reduction in working capital—equals $1,911,500 which is $1,500 less than $1,913,000), perhaps to reach a "round" figure.

See, also,

Durham and South Carolina Railroad, 84 I. C. C., 313, 315, 317.

In Southern Railway Company in Mississippi, *84 I. C. C., 253,* a valuation case, the "tentative valuation" of the principal carrier was made final without any change (at $4,470,534) and that of a subsidiary was reduced $13,500, the reduction being attributed to "an error in the tentative statement of the final value * * *"—*84 I. C. C., 253, 257.*

The foregoing analysis, which includes every decision but one rendered upon a protest to a "tentative valuation," by the full Commission, rather than by Division 1 of the Commission, indicates that the orders establishing these "tentative valuations," as well as the antecedent proceedings which are known only to the Commission (*supra, 104*), have the strongest persuasive force, if not always conclusive force, in all proceedings upon protest. It is significant that, in the omitted case (that of Evansville & Indianapolis Railroad Company, *75 I. C. C., 443*, the carrier protested, but did not appear at the hearing. On this "default," the Commission made the "tentative valuation" final, first striking out all data concerning "the present cost of condemnation and damages or of purchase of lands in excess of such original cost or present value"—*75 I. C. C., 443, 444.*

"Tentative valuations" have also been made "final valuations," *after protest,* but upon "default" or failure to support the protest by evidence, but without testimony in support of the "tentative valuation," in *Bowdon Railway, 84 I. C. C., 277; Wood River Branch Railroad, 84 I. C. C., 289; Rhode Island Company, 84 I. C. C., 299,* and *Hoosac Tunnel and Wilmington Railroad, 84 I. C. C., 343.*

Appellants consider that this analysis of decisions in valuation cases shows serious and irreparable injury accruing to any carrier which is forced to proceed through hearings on its protest, when such proceedings and protest are bottomed upon an incomplete and arbitrary "tentative valuation"

that fails substantially to conform with the statutory definition. The difficulties indicated are not merely legalistic and theoretical, they are practical and exigent, they are encountered at every point and are insurmountable if an order not substantially conforming with the statutory definition can stand as though it were a lawful "tentative valuation."

C. IN FIXING RAILWAY RATES AND OTHER MATTERS WITHIN ITS AUTHORITY, THE INTERSTATE COMMERCE COMMISSION CONSISTENTLY TREATS ITS "TENTATIVE VALUATIONS," AND EVEN THE INQUIRIES OF ITS BUREAU OF VALUATION THAT ARE PRELIMINARY TO "TENTATIVE VALUATIONS," AS HAVING EVIDENTIARY WEIGHT.

"We are constantly referring to our tentative reports and using their findings in determining the amount of allowable stock issues and otherwise in our work"—*Mr. Commissioner Potter and Mr. Commissioner Cox, dissenting, Florida East Coast Railway, 84 I. C. C., 25, 45.*

By paragraph (2) of Section 15a, added to the Interstate Commerce Act by the Transportation Act of February 28, 1920, it is provided that—

> "The Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will * * * earn

> * * * as nearly as may be, * * * a fair return upon the aggregate *value* of the railway property of such carriers held for and used in the service of transportation * * *"—Italics ours.

Paragraph (4), of the same section is as follows:

> "For the purposes of this section, such aggregate value of the property of the carriers shall be determined by the Commission from time to time and as often as may be necessary. *The Commission may utilize the results of its investigation under Section 19a of this Act, in so far as deemed by it available,* and shall give due consideration to all the elements of value recognized by the law of the land for rate-making purposes, and shall give to the property investment account of the carriers only that consideration which under such law it is entitled to in establishing values for rate-making purposes. Whenever pursuant to Section 19a of this Act the value of the railway property of any carrier held for and used in the service of transportation has been finally ascertained, the value so ascertained shall be deemed by the Commission to be the value thereof for the purpose of determining such aggregate value" —Italics ours.

Paragraph (6), the so-called "re-capture clause," also rests upon value. This paragraph reads, in part, as follows:

> "If * * * any carrier receives for any year a net railway operating income in excess of six

> per centum of the *value* of the railway property held for and used by it in the service of transportation. * * * For the purposes of this paragraph the *value* of the railway property * * * of a group of carriers * * * under common control and management and * * * operated as a single system, shall be computed for the system as a whole. * * * The *value* of such railway property shall be determined by the Commission in the manner provided in paragraph (4)"—Italics ours.

Paragraph (7), controlling the use of the carrier's reserve fund to be established under the "recapture" clause is, in part, as follows:

> "For the purpose of paying dividends or interest * * * a carrier may draw from the reserve fund established and maintained by it * * * to the extent that its net railway operating income for any year is less than a sum equal to six per centum of the *value* of the railway property held for and used by it in the service of transportation, determined as provided in paragraph (6) * * *"—Italics ours.

Paragraph (8) also makes use of *value,* similarly determined. The significant portion reads:

> "Such reserve fund need not be accumulated and maintained by any carrier beyond a sum equal to five per centum of the *value* of its railway property determined as herein provided * * *"—Italics ours.

Section 5, of the Interstate Commerce Act, as amended in 1920, empowers the Commission to authorize consolidations of railways, and paragraph (6), sub-paragraph (b) is as follows:

> "The bonds at par of the corporation which is to become the owner of the consolidated properties, together with the outstanding capital stock at par of such corporation, shall not exceed the *value* of the consolidated properties as determined by the Commission. The value of the properties sought to be consolidated shall be ascertained by the Commission under Section 19a of this Act and it shall be the duty of the Commission to proceed immediately to the ascertainment of such value for the properties involved in a proposed consolidation upon the filing of the application for such consolidation"—Italics ours.

In addition to the matters covered by the foregoing extracts from the law, it appears that the Commission regards the value of the railway property of a carrier as a condition affecting the propriety of according authority to issue securities under Section 20a of the Act. Thus the application of Pittsburgh and West Virginia Railway for authority to issue certain securities and to guarantee obligations of the West Side Belt Railroad Company was denied, apparently because the tentative valuation of the property that it was desired to acquire was accepted as establishing that its value was less than its book value and less than the par value of the securities proposed to be issued and the obligations to be assumed in connection with its acquisition—*76 I. C. C., 663, 668, 673.*

A "tentative valuation" appears to have controlled the determination upon the application of the Knoxville and Carolina Railroad Company to issue stocks and bonds—*72 I. C. C., 221.* That corporation, which had no securities outstanding and had been organized as a successor in reorganization to the Knoxville, Sevierville and Eastern Railway Company, applied for authority to issue $300,000 in par value of stock and $132,000 in par value of first mortgage six per cent bonds. The Commission stated that no objection to the granting of the application had been received. It also stated that the balance sheet of the applicant's predecessor in title recorded an investment in road and equipment, less depreciation, of $1,210,103.35. Nevertheless, upon the sole basis of the "tentative valuation," and the record of expenditures for additions and betterments subsequent to the valuation date, the Commission restricted the permitted issue of capital stock to $260,200 in par value. The report and opinion contains the following:

> "Our tentative valuation report shows the cost of reproduction of the property, less depreciation and including land, at June 30, 1916, as $380,440. There has been a net charge to the capital account through additions and betterments to road and equipment of $2,774 up to December 31, 1920, and the applicant represents that it has spent approximately $9,000 for similar purposes, making a total capitalizable value of $392,214. On this basis we shall authorize the issue of $260,200 of capital stock and $132,000 of bonds"—*72 I. C. C., 221, 222.*

The "tentative valuation" of this company was again referred to as evidence in a later application for authority to issue bonds, in which it was noted that no final valuation had been determined—*Knoxville & Carolina Railroad Bonds, 79 I. C. C., 542, 544.*

See also:

Craig Mountain Railway, 79 I. C. C., 60, 62;
Georgia, Ashburn, Sylvester & Camilla, 76 I. C. C., 166, 167;
Missouri-Kansas-Texas Reorganization, 76 I. C. C., 84, 103.

Increased Rates, 1920, 58 I. C. C., 220, often referred to as "*Ex Parte 74,*" seems to have been determined, in part, upon the basis of "tentative valuations," and even the preliminary inquiries of the Bureau of Valuation of the Commission. The Commission said:

> "While the valuation of the railroads under Section 19a of the Interstate Commerce Act is still incomplete, the work has progressed so far that the results are of value and informative in reaching the determination we are now required to make. So far as the work has produced results, either as to particular roads, or as showing general tendencies and principles, we have given consideration thereto"—*58 I. C. C., 220, 228.*

The cited case was decided on July 29, 1920. At that time the Commission had determined, in part

only, the "final valuations" of three carriers or systems of carriers, *Texas Midland, 75 I. C. C., 1; Winston-Salem Southbound, 75 I. C. C., 187; Kansas City Southern, 75 I. C. C., 223,* none of them of extensive mileage. Moreover, even *these three "final valuations" were incomplete,* and *in not one of them had the Commission fixed or stated a single-sum as the value of the entire carrier property of the corporation or system—75 I. C. C., 7, 188-9, 229.* The first case to fix a single-sum value was decided on July 11, 1922—*Evansville and Indianapolis Railroad, 75 I. C. C., 443.* It is clearly apparent, therefore, that to whatever extent the Commission relied upon the results of its inquiries under Section 19a in determining *Increased Rates, 1920, supra,* it must have used "tentative valuations" or data in process of being arranged, digested and summarized in making them. The progress of the investigations under Section 19a to November 1, 1920, three months after the decision last referred to, is shown by the Annual Report of the Commission for the year 1921, from which the following extract has been taken:

> "Prior to November 1, 1920, fifty-five tentative valuation reports, representing the properties of seventy carriers had been issued by us"—*Thirty-fifth Annual Report, p. 55.*

Freight rates on all railways in the country were substantially reduced, effective on July 1, 1922, by an order entered in *Reduced Rates, 1922, 68 I. C. C., 676,* and in this proceeding, also, there was extensive reliance upon "tentative valuations." On this point, the Commission said:

"More than twenty months have passed since our former determination,* and in that period the valuation of railroads under Section 19a has gone forward. The work is still incomplete, but has progressed to such an extent that we may accept the results with fuller assurance, both as to particular roads and as showing general trends and principles. * * *

"* * * We find no present reason to disturb the value taken by us in that proceeding as approximating the sums there stated, except to the extent that subsequent additions to or withdrawals from the property in service, including materials and supplies and working capital, and further depreciation, make adjustment necessary"—*68 I. C. C., 676, 684-5.*

The case last quoted was decided on May 16, 1922. On that date, there were still only three so-called "final valuations" in existence and these were incomplete, no one of them containing a single-sum value—*supra, 142.* Six and one-half months later, on December 1, 1922, the Commission reported (*Thirty-sixth Annual Report, pp. 70-71*), on the progress of its valuation work to the end of October, 1920, and stated that 287 "tentative valuations" had been served, covering four hundred corporations and 39,956 miles of railway or 16.11 per cent, less than one-sixth, of the railway mileage of the country. The same report shows (*p. 71*), that the Bureau of Valuation had made, to October 31, 1922, 555 accounting reports covering 151,572 miles of railway or 61.11 per cent of the country's mileage; 636 engineering reports cover-

*The reference is to *Increased Rates*, 1920, *supra.*

ing 179,475 miles or 72.37 per cent, and 671 land reports covering 144,411 miles or 58.23 per cent.

Use, in rate cases, of "tentative valuations" and other data collected by the Bureau of Valuation, was referred to in the same annual report, as follows:

> "In *Increased Rates, 1920, 58 I. C. C., 220,* decided July 29, 1920, we said with respect to valuation under Section 19a:
>
> > " 'So far as the work has produced results, either as to particular roads, or as showing general tendencies and principles, we have given consideration thereto.'
>
> "At that time we had available underlying valuation reports covering 15.5 per cent of the total mileage. In our consideration of *Reduced Rates, 1922, 68 I. C. C., 676,* we had available underlying valuation reports covering 47.7 per cent of the total mileage. We there said, page 684:
>
> > " 'More than twenty months have passed since our former determination, and in that period the valuation of the railroads under section 19a has gone forward. The work is still incomplete, but has progressed to such an extent that we may accept the results with fuller assurance, both as to particular roads and as showing general trends and principles.'
>
> "Analysis of the preceding summaries and of the schedule for the remaining months of 1922

indicates that for a similar survey of rates, fares, and charges the underlying reports available early in 1923 would cover approximately 75 per cent. of the total mileage"—*Thirty-sixth Annual Report of the Interstate Commerce Commission, 1922; p. 72.*

Data from "tentative valuations" were offered in evidence by complainants and received and considered by the Commission in *In the Matter of Rates and Charges on Grain and Grain Products, 91 I. C. C., 105,* decided on July 10, 1924. The following is quoted from the report and opinion:

"Complainants in the *Kansas case* urge that 'reductions in rates on grain applicable in the western group are in harmony with the purpose of section 15a of the transportation act when * * * the true net earnings of that period are applied to the fair value of property of carriers in the western group.' *A basic consideration, therefore, is the fair value of the property of carriers in the western group.* * * *

"In support of these contentions the complainants presented two exhibits. One was compiled from data published by the presidents' conference committee on valuation of the Association of Railway Executives, as to certain *basic figures from tentative valuations of railroads adopted and served as such by us.* This exhibit purported to show, as to 151 carriers in the western district (which includes the western group and mountain-Pacific group), the *relationship between the aggregate of the tentative final valuations found by us in that district and the recorded amounts in the*

accounts of investment in road and equipment of the same carriers. The exhibit also set forth the par value of the stock on valuation date, and the capitalized debt. *The tentative valuations were as of various dates, from 1914 to 1918.* The exhibit undertook to bring the investment in road and equipment from the valuation dates to December 31, 1919, by taking into account the increment in the road and equipment or property investment shown in the annual reports to the Commission or in various recognized statistical publications.

"* * * The witness stated that *the aggregate of the tentative final valuations* of these lines amounted to 78.19 per cent of the aggregate of the investment in road and equipment of the same carriers on the respective valuation dates, as stated in the books of the carriers.

"In another exhibit the percentage so deduced, 78.19 per cent, was applied to the book value, $8,818,454,872, of the roads in the western district, and *the result, $6,895,149,864, was stated as 'value for rate-making purposes as of December 31, 1919.' On this exhibit is based complainants' claim that reductions in rates on grain applicable in the western group are in harmony with the purpose of section 15a of the Act, when the true net earnings are applied to the fair value of the property of carriers in the western group.*

"The exhibit as originally submitted and received did not take account of additions and betterments subsequent to December 31, 1919, which the carriers claim amounted to approximately $700,000,000. *Adding that amount to the deduced value, $6,895,149,864, complain-*

ants in their brief state a value for rate-making purposes as of December 31, 1923, of $7,595,149,864. A return of 5.75 per cent on this amount is $436,741,116. It was seemingly accepted that the net return for the first nine months of the calendar year should be 68.9 per cent of the year's income. Applied to the value last stated this would give $300,900,848 as the theoretical 5.75 per cent return, on the basis of the aggregate value put forward by complainants. The net return for the first nine months was in fact $245,545,800.

"To the last-named amount the complainants add 'two-thirds of alleged excess maintenance charges against nine months' operation, year 1923,' $53,922,526, and show an adjusted net operating income for the first nine months of 1923 of $299,468,326, which is a rate of return of 5.72 per cent on the value as of December 31, 1923, computed by them as above stated.

"In determining whether this evidence is sufficient to cast serious doubt upon the validity of the values found as approximations in *Increased Rates, 1920, supra,* and followed in *Reduced Rates, 1922, 68 I. C. C. 676,* two questions are presented: (1) Whether the method pursued by complainants is sound; and (2) whether the data to which the method is applied were sufficient. In testing this evidence, broadly stated by complainants as merely casting a doubt and as not probative, *obviously we are not confined to the record, but may inform ourselves in any way open under section 15a* to enable us to determine whether the doubt cast upon our previous decisions is substantial or not"—*91 I. C. C., 105, 110-2,* Italics ours.

The Commission proceeded to review its use of "tentative valuations" in *Increased Rates, 1920, supra*, and in *Reduced Rates, 1922, supra*, and to an elaborate analysis of the method of applying these "tentative valuations" proposed by the complainants in the case then under consideration. This analysis occupies several pages (*113-6*) in the report and opinion. In concluding its analysis of this portion of complainants' testimony, the Commission said:

> "* * * The complainants exercised no selection as to roads, inasmuch as they took *all of the announced tentative valuations* in the order as they were approved for service and no criticism is therefore implied that unrepresentative roads were taken. But results obtained from a study of these 151 properties are dominated by the characteristics of the Great Northern, the Oregon-Washington Railroad & Navigation Company, and the Rock Island systems. The *tentative final value* found for these three dominating roads is ninety-eight per cent of the aggregate book investment on the valuation date. *The tentative final* values of the other roads, 148 in number, appearing in the exhibit, are but 55.3 per cent of the book investment on valuation date.
>
> "The exhibit tends to show that the final valuation* of the stronger and larger roads more nearly approximates the book value than is the case with the weaker and smaller roads. In other words, there is much more inflation

*This obviously means "tentative final value," as the term is used in the preceding paragraph.

in the book values of the smaller roads than in the case of the larger roads used in compiling the exhibit. In the progress of our valuation work a proportionately greater number of small roads have advanced to the tentative valuation stage than the larger roads. Thus, as has been previously pointed out, the inflation of the investment account of the smaller carriers has reflected itself conspicuously in a lower ratio found in the exhibit than a normal course would indicate as proper.

"The absence of important carriers such as the Santa Fe, Chicago & North Western, Burlington, Northern Pacific, Milwaukee, Missouri Pacific, Great Western, Minneapolis & St. Louis, Missouri-Kansas-Texas, Union Pacific, Frisco, Soo Line, Oregon Short Line, Denver & Rio Grande Western, Southern Pacific and Western Pacific minimizes the criticism inferable from complainants' exhibit"—*91 I. C. C., 105, 116,* Italics ours.

Following the foregoing, reference was again made to *Reduced Rates,* 1922, and the data relied upon in that case as establishing "value" under Section 15a were reviewed in the paragraphs which are reprinted below:

"The following general sources of information derived from the investigation under section 19a were deemed to be available, as that term was used in the statute.

"1. *Tentative valuations showing a final value, which have been approved for service and have been served* by the Commission upon

the carriers, the States, and the Attorney General of the United States. *As to many of these there are protests by the carriers,* and *in some cases by the States,* which are *yet to be heard.* In many cases no protest had been filed, and the value tentatively fixed is final or will become so when an appropriate order has been entered by the Commission. *In these cases, the amount so stated must, under the terms of section 15a, be used.* * * *

2. *Preliminary reports by our Bureau of Valuation sufficiently complete to be furnished by it to the carriers for their criticism,* as to which the three underlying reports have been completed. *In certain of these cases, tentative valuation reports had been drafted, but had not yet been served.* Of 137,766.45 miles of road in the western and mountain-Pacific groups, data were available as to approximately 43 per cent.

"The results obtained by a study of the available information procured under section 19a of the Act were brought to a common date by appropriate consideration of increments or reductions in investment due to extensions or new lines, additions and betterments, retirements, changes in depreciation reserves, and in working capital, including materials and supplies"—*91 I. C. C., 105, 117,* Italics ours.

Upon the evidence thus analyzed, the Commission reached the conclusion that the value determined in the earlier cases should stand.

"We have reviewed the evidence submitted on the question of value, and nothing of record

leads us to conclude that the basis of approximate value in the western district, adopted by us in 1920 and reviewed in 1922, should be changed"—*91 I. C. C., 105, 118.*

The entire discussion of values in the case last under discussion is so significant that it has been reprinted in full as Appendix II to this brief (*infra, 190-205*). It would alone suffice to show that *the "tentative valuations," including the order of March 28, 1923, contested in this proceeding, are continually relied upon as evidence in important contested cases.* It would be difficult to reach any conclusion other than that an erroneous and unlawful "tentative valuation" thus regarded and used, is strongly injurious to the carrier or carriers directly concerned.

See also:

Matter of New York, Philadelphia & Norfolk Railroad, 70 I. C. C., 299, 300;
Matter of Bullfrog Goldfield Railroad, 70 I. C. C., 354, 355;
Matter of Norfolk Southern Railroad, 70 I. C. C., 774;
Reduced Rates, 1922, 77 I. C. C., 675;
New England Divisions, 62 I. C. C., 513;
Graham and Gila Counties Traffic Association v. Arizona Eastern, 81 I. C. C., 134, 137;
Reduced Rates, 1922, 81 I. C. C., 170;
Arizona Corporation Commission et al. v. Arizona Eastern Railroad Company, 85 I. C. C., 76, 90.

Moreover, it is undeniably true, as stated by Mr. Commissioner Potter, in a dissenting opinion in the *Kansas City Southern Railway case, supra,* that:

> "Carriers may be injured by a proclamation that a certain figure is 'value' if that figure is not value"—*84 I. C. C., 113, 127.*

D. EVERY CARRIER IS ENTITLED TO A LAWFUL "TENTATIVE VALUATION," AS THE BASIS OF A PROTEST, IF IT DESIRES TO MAKE ONE, AND OF THE PROCEEDING UPON SUCH PROTEST, BUT PROTESTS BASED UPON ERRORS OF LAW IN A "TENTATIVE VALUATION" DO NOT RESULT IN THE FORMULATION OF A LAWFUL "TENTATIVE VALUATION" AND FAIL THEREFORE TO PROTECT THE RIGHTS INFRINGED BY AN UNLAWFUL ORDER, LIKE THAT OF MARCH 28, 1923.

It has already been noted (*supra, 103-8*) that each "tentative valuation" is the culmination of the first stage in the process provided for by Section 19a and, supplemented by a protest from a party in interest, the foundation and beginning of a second stage. An examination of paragraph (i)—*R. 4-5*—which provides for proceedings upon a protest to a "tentative valuation," will show that it does not contemplate the emergence from these proceedings of a new, revised or corrected "tentative valuation." On the contrary, these proceedings have for their object the determination of a "final valuation," which may be identical with the "tentative valuation" or a more or less modified and corrected form of the latter. The law is that—

> "If after hearing any protest of such tentative valuation under the provisions of this Act, the Commission shall be of the opinion that its valuation should not become final, *it shall make such changes as may be necessary, and shall issue an order making such corrected tentative valuation final as of the date thereof*" —*R. 5,* Italics ours.

It seems clear, from the foregoing, as well as from the meticulously detailed definition of the "tentative valuation," which precedes paragraph (i), that the Congress intended that the parties in interest, *i. e.,* the carrier or the carriers concerned and the public concerned, should always have a lawful "tentative valuation" on which to base any necessary protest. In other words, the protest and the subsequent proceedings were intended to correct errors of fact and not to correct errors of law or arbitrary refusals (which are also errors of law) to include property that ought to be valued as part of the carrier's property, like that specified in paragraphs XIII and XIV (*R. 8-9*) of appellants' petition. With regard to this particular property, if appellants could be deprived of their right to a "tentative valuation" thereof, they would never have, as to such property, the benefit of the process defined by the law for arriving at a "final valuation," even though in its order fixing such "final valuation" the Commission might see fit to include something for these important portions of appellants' common carrier system. Appellants consider that they are entitled to the statutory opportunity to protest, if they deem necessary, to a "tentative valuation" conforming

with the law and showing all the facts required by the law as to the property excluded in the order of March 28, 1923, as well as to their other property. But such opportunity could never be secured by means of the protest provided for in paragraphs (h) and (i)—*R. 4*—or the proceedings upon such a protest.

The Commission has repeatedly been asked to withdraw or re-issue "tentative valuations," on account of errors of law, but it does not appear that such relief has ever been accorded. In the *Texas Midland case, supra,* the Commission noted that a motion had been made and it was overruled, saying:

> "Together with its protest the carrier submitted a motion praying that all further proceedings be stayed and postponed until the tentative valuation required by law shall have been made and reported, it being contended that the tentative valuation theretofore served was insufficient. However, we proceeded with a hearing upon the merits of the protests which had been filed and the motion is overruled" —*75 I. C. C., 1, 5.*

The next valuation case was *Winston-Salem Southbound Railway, supra,* and it appears that the legality of the so-called "tentative valuation" was again questioned. The Commission concluded that the "tentative valuation" ought not to become a "final valuation," without modification, but declined to withdraw the "tentative valuation" or to make a new one, merely making its "final valuation" somewhat different. It said:

"It was protested by the carrier that the tentative valuation served upon it does not constitute the tentative valuation required by law in point of content or form. With respect to a similar tentative valuation in *Texas Midland Railroad, supra,* we have considered and determined a substantially similar objection, and following that decision, we shall alter its content and manner of arrangement in some respects"—*75 I. C. C., 187, 188.*

In the third case, that of *Kansas City Southern Railway, supra,* failure "to report a single sum as the value of the property" was an item in the carrier's protest—*75 I. C. C., 223, 229.* The Commission appears to have admitted the requirement but to have concluded that it might be postponed and that an incomplete "tentative valuation" could occupy the statutory position of one fully and substantially meeting the statutory definition. The Commission said:

"The carrier claims that we are required to report a single sum as the value of its property, * * *. In the *Texas Midland case,* we decided that we would ultimately, but not at that time, make a finding as to the value of carrier property for purposes under the Act to regulate commerce. We will, therefore, for the present, in this proceeding, make findings as to underlying facts with leave to the carriers and other parties to apply to be heard upon the undetermined question as to what single sums should be stated as the values of their properties. If parties should not desire

> to be heard upon this point, we will in due course *complete the final valuations* of the carriers"—*75 I. C. C., 223, 229,* Italics ours.

A similar ruling was made in the valuation case of *Atlanta, Birmingham and Atlantic Railroad, supra,* upon the carrier's motion to dismiss the proceeding, pending the determination of a new "tentative valuation" in conformity with the law. The Commission said:

> "* * * A decision on these motions was postponed pending consideration of the case on its merits. A similar motion was made in the *Texas Midland case.* Following the decision in that case and considering the facts appearing of record, we find that the tentative valuations served in this case comply with the provisions of the valuation act, and the motions to dismiss the proceeding and serve other and different tentative valuations are denied. We shall, however, make such alterations, modifications, or additions as the facts may warrant"—*75 I. C. C., 645, 648.*

See also:

San Pedro, Los Angeles and Salt Lake Railroad, 75 I. C. C., 463, 465;
Matter of the Petition of National Conference on Valuation of American Railroads, 84 I. C. C., 9, 10;
Texas Midland Railroad, 84 I. C. C., 150, 152;
Ann Arbor Railroad, 84 I. C. C., 159, 160;

Danville and Western Railway, 84 I. C. C., 227, 228;
Southern Railway in Mississippi, 84 I. C. C., 253;
Durham and South Carolina Railroad, 84 I. C. C., 313, 314-5;
Knoxville, Sevierville and Eastern Railway, 84 I. C. C., 329.

It is seen, therefore, that appellants have been substantially injured, and are threatened with substantial injury, as the result of an order formulated by the Commission in substantial violation of the statute empowering it to act. The law has been disobeyed; appellants suffer therefrom; they are threatened with further injury; it is not conceivable that they are without remedy.

FOURTH.

This is a suitable proceeding in which appellants are entitled to relief against the order of March 28, 1923.

By the Commerce Court Act (*36 Stat., 539*), the court which gave its name to the statute was awarded jurisdiction of suits brought "to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission." The Urgent Deficiency Act of October 22, 1913 (*38 Stat., 219*), transferred this jurisdiction to "the several district courts of the United States" and established the venue according to which this proceeding was begun in the District Court for the Southern District of New York.

The language of the statute is "any order" and the courts have held that orders are to be set aside when the action of the Interstate Commerce Commission—

> "is arbitrary or transcends the legitimate bounds of their authority"—*Seaboard Air Line Railway v. United States, 254 U. S., 57, 62.*

Orders of the Commission are also to be set aside by the courts when they are—

> "beyond its statutory power; or (3) based upon a mistake of law"—*Interstate Commerce Commission v. Northern Pacific Railroad, 222 U. S., 541, 547.*

And, as was said in the decision last quoted above:

> "But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears * * * the Commission acted so arbitrarily and unjustly * * * or without evidence * * * or if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of power"—*222 U. S., 541, 547.*

Power to make the order, power which must be found within a statutory grant, is the question the courts must determine—*Interstate Commerce Com-*

mission v. Illinois Central Railroad, 215 U. S., 452, 470.

In the instant case the statute will be searched in vain in the effort to find a grant of power to make a "tentative valuation" departing so widely and in such fundamentally important particulars from the statutory definition. The authority granted is to comply with the statute, not to deny and evade its basic principle, namely, that the "tentative valuation" must comprehensively, and in the lawful detail, inform all parties in interest, public and corporate, of what they have to meet and overcome if they are dissatisfied with its conclusions.

See also:

Interstate Commerce Commission v. Northern Pacific Railroad, 222 U. S., 541, 547;

Southern Pacific Company v. Interstate Commerce Commission, 219 U. S., 433, 449;

Interstate Commerce Commission v. Chicago, Rock Island & Pacific Railway, 218 U. S., 88, 110;

United States v. New River Company, 265 U. S., 526, 539-541.

In several cases orders of the Commission have been set aside because it has misconstrued the meaning of such terms as "lateral branch line" and "reasonable and satisfactory through route." See:

Interstate Commerce Commission v. Delaware, Lackawanna & Western Railroad, 216 U. S., 535, 537-8;

United States v. Baltimore & Ohio Southwestern Railroad, 226 U. S., 14, 18-9;

Interstate Commerce Commission v. Northern Pacific Railway, 216 U. S., 538, 544;
Harriman v. Interstate Commerce Commission, 211 U. S., 407, 420.

Orders of the Commission may be set aside, when not in accordance with the statutory grant of power, even though those seeking relief were not parties to the proceedings before the Commission:

Interstate Commerce Commission v. Diffenbaugh, 222 U. S., 42, 49;
Skinner and Eddy Corporation v. United States, 249 U. S., 557, 562-3;
Hines' Trustees v. United States, 263 U. S., 137, 147-8;
Atlantic Coast Line Railroad v. Interstate Commerce Commission, 194 Fed., 449, 451;
Louisiana and Pacific Railway v. United States, 209 Fed., 244, 251.

Appellants recognize that there are some orders of the Interstate Commerce Commission which are exempt from judicial review. An order fixing a date for a hearing belongs to this class. Such an order was subjected to attack by suit in *United States v. Illinois Central Railroad, 244 U. S., 82,* and the Court said:

> "The notice, therefore, had no characteristic of an order, affirmative or negative. It was a mere incident in the proceeding, the accident of the occasion—in effect, and, it may be contended in form, but a continuance of the hear-

ing. The fact that the continuance was to another day and place did not change its substance * * *"—*244 U. S., 82, 89.*

The case of *Proctor & Gamble v. United States, 225 U. S., 282,* is not much, if any, broader, when considered in the light of the facts involved and the question really at issue. Appellants had complained to the Commission of certain demurrage charges for undue detention of freight cars and the Commission, after hearing, had determined that these charges were reasonable and lawful and dismissed the complaint, entering no order except one of dismissal; negative, therefore, both in form and substance. Thereupon, the defeated complainant before the Commission began a suit in the Commerce Court *to set aside this order of dismissal.* The Commerce Court held that it had power, in a proper case, to review such an order, but that, in the case before it, the Commission had judged rightly upon the facts and law and, hence, the Commerce Court, in its turn, denied relief and dismissed Proctor and Gamble's petition. Appeal was taken from the Commerce Court to the Supreme Court, by Proctor and Gamble, and the judgment of the Commerce Court was affirmed, although the Supreme Court took occasion to say that an order of the Commission dismissing a complaint was not intended to be reviewed by the Commerce Court. It is apparent that to have decided otherwise would have been to exercise the administrative discretion conferred on the Commission, *i. e.*, to have decided that the charges complained against were unreasonable. Plainly, there is no reason or authority for extending the declarations made in this

case to an order, affirmative in form and substance, like that now in issue. The proper scope of the decision in the *Proctor and Gamble case, supra,* is indicated by *Manufacturers' Railway Company v. United States, 246, U. S., 457,* in which the Court said:

> "Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission (*Interstate Commerce Commission v. Alabama Midland Ry. Co., 168 U. S., 144, 170*), and upon which its decisions, made the basis of administrative orders operating *in futuro,* are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed Constitutional limits, or for some other reason amount to an abuse of power. This results from the provisions of Sections 15 and 16 of the Commerce Act as amended in 1906 and 1910 (*34 Stat., 589-591, c. 3591; 36 Stat., 551-554, c. 309*), expounded in familiar decisions. *Interstate Commerce Commission v. Illinois Central R. R. Co., 215 U. S., 452, 469-470; Interstate Commerce Commission v. Union Pacific R. R. Co., 222 U. S., 541, 547; Proctor & Gamble Company v. United States, 225 U. S., 282, 297-298; Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 227 U. S., 88, 91.*
>
> "In the present case the negative finding of the Commission upon the question of undue

discrimination was based upon a consideration of the different conditions of location, ownership, and operation as between the Railway and the Terminal—*28 I. C. C., 104, 105; 32 I. C. C., 102.* The conclusions were reached after full hearing, are not without support in the evidence, and we are unable to say that they show an abuse of discretion. It may be conceded that the evidence would have warranted a different finding; indeed the first report of the Commission was to the contrary; but to annul the Commission's order on this ground would be to substitute the judgment of a court for the judgment of the Commission upon a matter purely administrative, and this cannot be done—*United States v. Louisville & Nashville R. R. Co., 235 U. S., 314, 320; Pennsylvania Co. v. United States, 236 U. S., 351, 361.* • • •

"It hardly can have escaped attention that the real complaint of appellants respecting the order now under consideration is directed not to what the order requires to be done, but to what it does not require. It granted a part of the relief for which appellants had applied to the Commission. Recognizing the Railway as a common carrier to which allowances and division might be accorded by the trunk lines, and that through routes were in operation between the Railway and those lines, it fixed the maximum joint rates, and went no further for the present. The real ground for resorting to the courts in this case is the failure to fix divisions. In effect the District Court was asked to perform a function specifically con-

> ferred by law upon the Commission. But that court has only the same jurisdiction that formerly was vested in the Commerce Court (*Act of June 18, 1910, c. 309, 36 Stat., 539; Act of October 22, 1913, c. 32, 38 Stat., 208, 219*); and it is settled that this does not permit the court to exercise administrative authority where the Commission has failed or refused to exercise it, or to annul orders of the Commission not amounting to an affirmative exercise of its powers—*Proctor & Gamble Co. v. United States, 225 U. S., 282, 292, et seq.*"—*246 U. S., 457, 481-3.*

Determination of value, under statutes of the character of the Valuation Act, is a function legislative in character—*Keller v. Potomac Electric Power Company, 261 U. S., 428, 440-4.* It follows, in accordance with the authorities herein cited, that when it is delegated to an administrative tribunal, like the Commission, the "wholesome rule" that the statutory method must be substantially adhered to is applicable and enforceable. That is all that appellants seek in this proceeding.

Reviewing, very recently, the cases in which it has been held that certain orders of the Commission are not subject to review, this Court said:

> "This Court declined to interfere because to do so would have involved exercise by it of the administrative function of granting the relief which the Commission, in the exercise of its jurisdiction, had denied"—*Chicago Junction Case, 264 U. S., 258, 264.*

The real test, upon an application to enjoin or set aside an order of the Commission, is whether

granting the relief sought would constitute an exercise by the Court of any administrative function that has been *properly delegated to the Commission.* A suspension or setting aside of the order of March 28, 1923, or an injunction in accordance with the prayer of appellants' petition (*R. 12*), would not amount to such an exercise of non-judicial power. Its substantial result would be merely to require the Commission to make a new "tentative valuation" in conformity with the authority granted to it by Congress. Indeed the substantial result of a permanent injunction in the instant case might go one step farther and *correct a condition which some members of the Commission regard as pregnant with calamity.* With the concurrence of Mr. Commissioner Cox, Mr. Commissioner Potter said, in a late dissenting opinion:

> "As we are now doing our work, it will be necessary, as I see it, to take practically all our reports into the courts * * *. This will be the natural consequence of giving conclusions and withholding reasons and arriving at aggregate figures without showing how we reach them. * * * The expense and delay will be frightful. * * * *Correct practices now would avoid the calamity for which we are headed*"—*Florida East Coast Railway, 84 I. C. C., 25, 45,* Italics ours.

The order now before this Court *is a final order in the sense that it establishes the only "tentative valuation" which the appellants can obtain from the Commission if it is treated as a "tentative valuation"* and is not set aside in this proceeding. And a "tentative valuation" is as final, as a "tenta-

tive valuation," and for the purposes for which it is made, as any order of the Commission can be—*Prendergast v. New York Telephone Company, 262 U. S., 43, 49.* It is the foundation for proceedings upon a protest, it may ripen into a "final valuation," and, even as a "tentative valuation," it is used by the Commission for the purposes of Section 15a of the Interstate Commerce Act and other purposes. It is a definite, and, in this case, an unwarranted and injurious, exercise, or attempted exercise, of the legislative function delegated to the Commission.

The situation here disclosed parallels in some degree that presented by the *Prendergast case, supra,* in which the rates enjoined were temporary and provisional only. Deciding that case, this court said:

> "Nor did the fact that the orders of the Commission merely prescribed temporary rates to be effective until its final determination, deprive the Company of its right to relief at the hands of the Court. The orders required the new reduced rates to be put into effect on a given date. They were final legislative acts as to the period during which they should remain in effect pending the final determination, * * *"—*262 U. S., 43, 49.*

If appellants have not been *legally* injured, and are not threatened with added and greater injury, *as matter of law,* by the order of March 28, 1923, it is, then, plainly evident that the *legal situation* is very different from the *practical situation,* for *in every practical sense, they have unquestionably been injured, and are threatened with still greater injury.*

The order here complained of is affirmative in the full sense in which the Supreme Court said that the order under consideration in *United States v. Atchison, Topeka & Santa Fe Railway, 234 U. S., 476,* was affirmative, that is to say, as the statute says that the carrier shall have a "tentative valuation" containing certain things and representing a certain sort and breadth of investigation:

> "It is affirmative, since it refuses that which the statute in affirmative terms declares shall be granted * * *"—*234 U. S., 476, 490.*

It constrains appellants, if it is not enjoined, either to let a "tentative valuation," which in scarcely any particular complies with the law, ripen into a final valuation, or to proceed, in difficulty and darkness, to attack a "valuation" as to essential elements of which they are not advised, although Congress expressly provided that they should be advised fully and in detail.

And in dealing with the order of March 28, 1923; in determining the scope of the judicial power and duty in the premises; the Court will observe that, as said in the case last cited—

> "an investiture of a public body with discretion does not imply the right to abuse, but on the contrary, carries with it as a necessary incident the command that the limits of a sound discretion be not transcended which by necessary implication, carries with it the existence of judicial power to correct wrongs done by such excess"—*234 U. S., 476, 491.*

It may be argued in this Court, as it was in the District Court, that appellants began this proceed-

ing prematurely and that it was their duty to proceed upon the order of March 28, 1923, as though it were a lawful "tentative valuation," thereby somewhat indefinitely postponing their need of relief. The delay might be long and it would certainly be injurious. Moreover, the opportunity for a lawful "tentative valuation" would have been allowed to pass and the proceedings subsequent to the "tentative valuation," which the law prescribes, would have gone forward upon an injurious, irregular and unlawful foundation. Parties are not required to submit to such damage or to such delays—*Oklahoma Natural Gas Company v. Russell, 261 U. S., 290, 293; Pennsylvania v. West Virginia, 262 U. S., 553, 592-3.*

It is for consideration, also, that such a postponement might have forced appellants into many successive situations in which they would have been obliged repeatedly to seek relief in the courts. In *Kansas City Southern Railway v. Interstate Commerce Commission, 252 U. S., 178,* it appears that the railway corporation in interest adopted precisely the course that is thus suggested. That is to say, the Kansas City Southern, although faced by a "tentative valuation" which it contended was unlawful, and the subsequent decision of this Court shows that it was unlawful, filed its protest and proceeded to a hearing before the Commission on such protest. At an early stage in that proceeding, the Commission refused to accept evidence as to one of the matters specified as a subject of inquiry under the Valuation Act and the carrier applied to the Supreme Court of the District of Columbia for a *mandamus* requiring the Commis-

sion to pursue the specific inquiry which it had declined. Abundant references, in this brief, to decisions of the Commission in which it has *refused*, in valuation cases, (1) to investigate original cost, (2) to apply prices current on the valuation date, (3) to include property used but not exclusively used by the carrier under valuation and owned and also used by another carrier (4) to value the whole property owned by the carrier, and (5) to follow the statutory requirements in other particulars, plainly show that these appellants, had they followed the same course as the Kansas City Southern, might have been forced repeatedly into *mandamus* proceedings, all which might successively be brought to this Court upon appeal. Compared with the prolonged and costly litigation thus indicated, the present proceeding is simple and expeditious. It requires only that the order of March 28, 1923, purporting to establish a "tentative valuation," shall be set aside, and the Commission advised as to its duties in the premises, in order that a new and lawful "tentative valuation" may issue and that the determination of value may proceed, before the Commission, upon the statutory foundation and in the orderly manner prescribed by the law.

It is to be borne in mind, as previously observed (*supra*, 78) that appellants are not now in this Court seeking that any particular value shall be attributed to their properties or that their values be determined with particular reference to, or emphasis upon, any particular class or kind of evidence of value. Their complaint is that the Commission has not proceeded in accordance with the law from which it derives all its authority.

They are convinced that, if the statute is followed; that is to say, that if the Commission shall be required to make a lawful "tentative valuation," they will be able, in proceedings before the Commission based upon such a "tentative valuation," fully to protect the values representing their properties and their rights.

One further consideration in support of the existence of power to grant the relief sought by appellants in this proceeding, will be briefly stated. In *Bluefield Water Works and Improvement Company v. Public Service Commission, supra,* decided by the Supreme Court on June 11, 1923, it was noted, *citing Ohio Valley Company v. Ben Avon Borough, 253 U. S., 287, 298,* that in this class of cases there is a Constitutional right "to the independent judgment of the court as to both law and facts." The extraordinary provisions of paragraph (j) of Section 19a (*R. 5*), limiting the method and scope of judicial review of any determination of "final value" under that section, suggest, at least, that unless the "tentative valuation," defined and provided for in the previous paragraphs of the section, can afford the requisite opportunity for correcting errors of law and abuses of discretion or power on the part of the Commission, the whole of Section 19a may be unconstitutional and void. Courts will construe acts of legislation in such a way as to avoid Constitutional defects and grave doubts as to Constitutionality—*See; Keller v. Potomac Electric Power Company, 261 U. S., 428, 445.*

The desirability of an early determination of the broad and general questions involved in this case

has even been indicated by appellees. The Solicitor General, in his motion to advance, submitted on March 10, 1924; granted on March 17, following, stated that—

> "The facts involved and the questions sought to be raised are not unlike those now being urged before the Commission in tentative valuations of other railroad properties under Section 19a * * *. It is important that the power and authority of the Commission in such cases should promptly be determined that the progress of its work may not be retarded. The public interest is involved"—*Motion to advance, p. 2.*

These questions would merely be postponed should appellants be forced to proceed, before the Commission, upon the order of March 28, 1923, as though it established a lawful "tentative valuation" —*supra, 168-9.*

Conclusion.

The decree of the District Court of the United States for the Southern District of New York should be reversed.

All which is respectfully submitted.

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APPENDIX I.

EXTRACT FROM REPORT AND OPINION OF THE MAJORITY OF THE INTERSTATE COMMERCE COMMISSION, CONCURRING OPINION OF MR. COMMISSIONER POTTER, DISSENTING OPINION OF MR. COMMISSIONER EASTMAN AND DISSENTING OPINION OF MR. COMMISSIONER McMANAMY, IN THE MATTER OF THE PETITION OF NATIONAL CONFERENCE ON VALUATION OF AMERICAN RAILROADS, 84 I. C. C., 9, DECIDED ON NOVEMBER 13, 1923.

a. Extract from majority report and opinion.

"The first prayer asks that we recommit each and every tentative valuation proceeding now pending to our Bureau of Valuation with directions that it shall proceed forthwith to ascertain and report:

"1. Original cost to date of each piece of property owned or used by a common carrier for common-carrier purposes;

"2. Separately from improvements the original cost of all lands, rights of way, and terminals owned or used for the purposes of a common carrier and ascertained as of the time of dedication to public use;

"3. Separately the original cost of property held for purposes other than those of a common carrier; and

"4. The amount and value of any aids, gifts, grants of rights of way, or donations, and the grants of land and money derived from the sale of any portion of such grants and the value of the unsold portion thereof at the time acquired and at the present time, as well as the amount and value of any concession and allowance made by such common carrier to Federal, State, county, or municipal governments in consideration of such aids, gifts, grants, or donations."

b. Concurring opinion of Mr. Commissioner Potter.

POTTER, *Commissioner,* concurring with modification:

"I agree with the majority that we should not grant the motion to remit proceedings to our bureau with instructions. The task of valuation is for the commission, and we may perform it ourselves or in our own way if we proceed regularly and make the findings which the law requires. I do not concur in the reasons of the majority for its action. *I think that in all of our valuations we should make the findings which the petitioner desires, and I apprehend that our final valuations are invalid when we do not do so. There is, in my judgment, no serious difficulty in making the findings which petitioner suggests. The majority assumes that there is difficulty and takes far too seriously the burden of finding original cost. Like most impossible tasks, it can be*

done. We are not directed to report book entries. We are to investigate and report a conclusion, and we are not relieved from that task if some one has made it more difficult by destroying records. *We arrive at our conclusion the same way we arrive at other conclusions—by using the best competent evidence that is available. Where cost is the question and records are not available, evidence as to what the cost should have been is always competent. An estimate may, in fact, be much more reliable than a book entry of actual payment.*

"It is necessary in order to deal with the facts peculiar to each carrier to proceed as petitioner contends, and to make findings regarding the various elements that determine value. *We should announce principles in accordance with which we will rate them.* In a general way they fall into classes. For instance, there is the mistake class—carriers nonessential, and which should be scrapped. Carriers have no greater right than any other enterprise to have losses due to mistakes placed upon the public. Such carriers should be valued at their realizable value on sale through being taken up or otherwise. Another class would include carriers which are essential though their showing of public service, capacity, efficiency, and earning is limited. *As to these I incline to the view that, with certain limitations, original cost to date or prudent investment should be protected and is to be accepted as the measure of value.* Where it appears as to an essential carrier that there is

no likelihood of it being able, under rates reasonable in its section for railways as a whole, to earn a fair return on original cost or prudent investment, because perhaps of mistake in part in location or construction, or because of exhaustion of tonnage, there, seemingly, is no warrant for valuing it above the value indicated by returns even though this be below original cost. In such case excessive value would inure to the advantage of other lines and increase the shippers' burden without benefiting the carrier directly involved. *As to such carriers knowledge of original cost is a basic requisite, and we must have it.* A third class would include carriers which have shown service, capacity, efficiency, and earnings of high degree due to the wisdom of their conception, construction, etc. Such carriers may have demonstrated that if they were not now in existence it would be wise to construct them on the basis of reproduction cost. A study might suggest that their value is equal to reproduction cost. Reproduction cost should be considered in relation to value and to some extent may have influence in determining value, but is not controlling. Certain carriers superior in a greater degree may have a value greater than reproduction cost. Past, present, and prospective earnings, amount and character of securities, and their selling values are also to be considered in rating carriers.

"Obviously selling prices of securities in lots of various sizes or even the average price over a substantial period should not alone be adopted as measuring the value of the property as a whole. This is particularly true of rail-

ways, which in recent times have borne more, perhaps, than their full share of the brunt of world disturbance and readjustment. Their securities have suffered in their market position because of the enormous amounts of Federal, State, and municipal tax-free securities and high-grade industrial bonds bearing interest at from six to eight per cent. per annum which have been issued during recent years, and because of the loss of credit and the uncertainty of return, due to the increasing national habit of regulation and political attack. Prior to 1916 the aggregate outstanding bonds of the United States, the States, and municipal subdivisions did not exceed $4,500,000,000. There were no Federal income taxes prior to 1913, and before the war Federal income taxes were nominal. By the end of 1922 such securities outstanding enjoying advantages in taxation had increased to upward of $32,000,000,000, and they are increasing at the rate of about $1,000,000,000 per annum. The average pre-war rate of interest borne by about 80 per cent. of all outstanding railway bonds, being those of relatively high grade, was approximately four per cent., which is less than the average rate borne by tax-exempt Federal, State, and municipal bonds. The tax burden on such railroad bonds reduced their net yield to from two to three per cent. per annum. Market prices necessarily go down to where the interest realized by the purchaser on the price paid for the railroad bond will equal approximately that paid on the tax-free bond and the higher interest-bearing industrial

bonds. The competition of Government to obtain moneys on a higher rate basis and the absorption of investment funds by securities enjoying an advantage in net return, and the other influences affecting selling prices of securities but not real property values, have been so appalling in their effect upon the market price of railway securities that market quotations afford no reliable indication of fair property value. This is clearly illustrated by the trend of quotations.

"Notwithstanding the fact that approximately $5,500,000,000 of new money was put into the railways between 1912 and 1922 at the rate of approximately $550,000,000 per year, the aggregate market value of stocks and bonds of the carriers, indicated by market quotations, which was upwards of $15,000,000,000 in 1912, declined to approximately $13,000,000,000 in 1922. Deducting the new money from the 1922 figure would leave less than $8,000,000,000 to represent the shrunken value indicated by market quotations of capital investment which in 1912 was regarded as worth upwards of $15,000,000,000. This startling change seemingly reflects no change of fair values, but only the effect upon realizable or selling values caused by Government competition and the adverse conditions to which I have alluded. Market prices go up when there are more who want to buy than who want to sell, and when there are more who want to sell than who want to buy, they go down. The increased distribution of approximately $27,000,000,000 of securities carrying

higher net return, enjoying governmental fostering and protection, in competition with lower interest-bearing railway bonds suffering from regulation, prejudice, and attack, could have no other effect than to draw the investors' money, discourage would-be buyers of railway securities, reduce their number, and 'bear' the market. With a limitation of the issue of tax-free securities, railway securities naturally will react to higher levels. While just estimate of fair property values must, for the reasons stated, far exceed the indications of security quotations, it is true, in view of the fact that all railway securities have suffered alike, that selling prices may properly be used to indicate relative values, and due note should be taken of them. Some carriers will rank higher than others of equal or greater cost.

"Only by a study of the facts and conditions as they obtain and differ among the several carriers can we rank them as they belong and find the value which the Supreme Court had in mind when, in the *Minnesota Rate cases,* it said:

> "'As the company may not be protected in its actual investment, if the value of its property be plainly less, so the making of a just return for the use of the property involves the recognition of its fair value if it be more than cost.'

"We should determine upon and announce the principles we apply in analyzing the merit of the carriers. *The specific findings that the*

statute requires are essential. In this way an administrative body would assure consistency in its work, exhibit intelligent reasons for what it does, furnish opportunity for review of its action by other tribunals, and provide protection against its mistakes. Study of the merits and demerits of the various carriers, and thus determining their ranking and relative value in the light of sound economic principles to be openly and frankly applied by us, will avoid such calamities as will result from applying the rigid rule of reproduction cost. *It would at the same time accord fair value to all carriers. If proceedings based on our findings are to avoid the defense of confiscation, we must find proper relative value and accord to each property its fair value based on its peculiar merit. We must therefore find and show that we have properly considered all the relevant elements and have given due weight thereto.*

"The ascertainment of a figure of final value involves the exercise of judgment in finding the significance and relation of the various elements that determine value. *It involves a judgment that acts upon factors which it grasps and is able to define.* A judgment regarding the various elements must precede a judgment of the whole, and without the former the latter can not exist. Different treatment of the several elements in dealing with several lines will produce different conclusions respecting final values. *Unless it is shown how the different elements were understood and treated, correction of error in the final judg-*

ment as to final value is impossible. In such a case our "judgment" can only be a guess, a jumble of elements and considerations which we do not understand. It is in fact worse than a good guess, for the influence we give to one particular element leads our judgment far astray. Farms of equal area have differing values because of their location, nearness to market, fertility, efficiency, and capacity to produce and earn. One less fertile than the others may have greatest value because the market for its products makes it the biggest earner. The valuation of railway properties requires resort to the same sensible exercise of judgment brought to bear upon the several elements as they differ on different lines. Value means just that and nothing else.

"It is easy to show how we deal with the several factors in different cases. We can show as to each original cost, reproduction cost, operating results, past and present and prospective traffic, and service to the public, amount and value of its securities, and any other elements, and deal with them all in each case, so our action in all cases will be consistent. Two properties may show similar original cost and estimate of reproduction cost, similar volume of traffic handled, and similar gross earnings. The net of one may exceed the other because of the advantage of location and greater efficiency. Clearly, other things being equal, one, for this reason, may have greater value than the other. We should in a proper case find such greater value *and assign the reason.* Another comparison may show that down

to the present one has been at a disadvantage respecting earning showing, but it may appear that the one which has made the better showing is approaching exhaustion of tonnage and the other gives promise of increasing tonnage for many years to come. In such a case we should perhaps deal with this latter factor as offsetting the apparent disadvantage with respect to showing of past earnings. So with respect to selling prices of securities which the law requires us to consider. Selling prices of certain securities are influenced largely by the amount of earnings distributed to stockholders. It may appear, however, in one case that lower dividend payments really reflect a more conservative policy for a property of greater value. Selling prices influenced by dividend distribution may be misleading. The securities of another property may sell at high figures because of tributary tonnage that must later move, though earnings in the past have not been great. We can deal with all these elements that the law requires us to deal with and bring sound judgment to bear on each.

"If we were to consider a half dozen or more cases in a given section at the same time and make careful comparison of the different factors as they relate to each, we could act consistently. *The analysis and explanation of our action would bring out the soundness of our exercise of judgment. If it appeared that we were not consistent in our action, our error would be apparent and could be corrected.* The fact that there are many carriers to be valued does not in any sense alter our duty. Perhaps

we should consider carriers in groups and examine several at the same time. Whether we should do this or not is one of the principles and methods that we should determine upon and regarding which perhaps we should have a public hearing. In any event, *we should be willing to announce principles and apply them so that our judgment may be put to test.*

"Of course, the task is difficult. Perhaps, as has been suggested in one of our cases, it is made more difficult by the fact that it is required to be the work of 11 men. *I do not think this is true, for I think it would be made relatively simple if we were to announce principles and methods. If it be true that we are incapacitated because we are 11, that may be a reason for recommending to the Congress that the work be taken away from us and given to fewer men. But it is no reason why the work should not be done.* It is because the task is a difficult one that Congress, after we have expended many millions, continues to make appropriations for the work. The work should be done so that our results are entitled to weight, or it should not be done at all. *If we can not do it in a manner to give credence to what we do, we should inform Congress of this fact and recommend that appropriations for the work be discontinued.*

"The final and tentative valuations that we have made to date demonstrate conclusively that we have applied to the extent of domination the inelastic rule of reproduction cost without due regard to whether resulting values are fair, excessive, or too low. In following the course which I have suggested or some

modification thereof, properly worked out and determined upon, we would comply with the transportation act and the law of the land as announced in *Smyth v. Ames*, and other cases, and at the same time present to our own minds facts peculiar to each carrier in such manner as to make the most intelligent and consistent consideration of them possible. That we should proceed in this fashion was the intent of Congress when by section 19a of the Valuation Act it directed us to report—

> " 'original cost to date, the cost of reproduction new, the cost of reproduction less depreciation, and an analysis of the methods by which these several costs are obtained, and the reasons for their difference, if any,'

"and to—

> " 'report separately other values and elements of values, if any, of the property of such common carrier, and an analysis of the method of valuation employed, and the reason for any differences between any such value and each of the foregoing cost values.'

"It was for the same reason that by the same statute the Commission 'in addition to such other elements as it may deem necessary' was required to report—

> " 'upon the history and organization of the present and of any previous corporation operating such property; upon any increases

> or decreases of stocks, bonds, or other securities, in any reorganization; upon moneys received by any such corporation, by reason of any issuance of stocks, bonds, or other securities; upon the syndicating, banking, and other financial arrangements under which such issues were made and the expenses thereof; and upon the net and gross earnings of such corporation.'

"and to report—

> "'any aid, gift, grant of right of way or donation.'

"The various particulars to which I have referred were in mind when it was provided by section 15a that we—

> "'shall give due consideration to all the elements of value recognized by the law of the land for rate making purposes.'

"It must be remembered that 'the law of the land for rate making purposes,' as it existed prior to the enactment of 15a and was continued by that section, was defined in *Smyth v. Ames*, where the court said:

> "'We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original

cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating value of the property.'

"*It was to prevent us from overlooking any of these elements and to force proper consideration of them, so that our action might be reviewed and the law amended if need be, that the Congress dealt so specifically in its instructions as to the findings we should make. Obedience to those instructions is not only due to the source of our authority but is essential to valid action.*

"The first duty of a tribunal is to aim at just conclusions. The second is to so act that error will be discovered and corrected. No tribunal may, with propriety, act in such manner as to prevent the weighing of its reasons or the testing of its motives. It is certain that there is a large percentage of error in our valuation work. It could not be otherwise in a task of such magnitude, and particularly in view of the handicaps we are under in performing it.

"In a separate expression, which I expect to file at an early date in a valuation case, where

I shall attempt to illustrate the unsoundness and insufficiency of our procedure and point out the course I think we should follow in valuing properties, I shall explain more at length the reasons why I am generally in accord with the contentions of the petitioner as to the findings we should make.

"I am authorized to state that Commissioner Cox joins in this expression."

c. Dissenting opinion of Mr. Commissioner Eastman.

EASTMAN, *Commissioner*, dissenting in part:

"The keystone of the argument in support of this petition, as I understand it, is that the words 'original cost to date,' as they are used in Section 19a, do not mean actual cost to the carrier, but rather reasonable cost of production at the time when the property was produced. In other words, we must find what the property should have cost rather than what it did cost.

"In my dissenting statement in the *San Pedro case, 75 I. C. C., 463, 523-567*, I expressed the opinion that value for rate-making purposes should be based on the amount invested honestly and with a reasonable degree of providence in the property. To determine such investment it is necessary to know, as nearly as may be, what the property should have cost. From my point of view, therefore, it makes little difference what the meaning of

the words 'original cost to date' may be. *The fact which petitioners want reported is necessary to the determination of so-called 'final value'; we have full authority to ascertain all necessary facts, and we should exercise that authority.*

"Moreover, as I see the situation, this fact should be ascertained and reported even if it be assumed that my views as to value for rate-making purposes are incorrect. *I know of nothing more important in this connection than that the people of the country should have full information indicating:*

"1. What the railroad properties should reasonably have cost.

"2. The extent to which their construction was aided by public or private gifts, grants, and donations.

"3. The extent to which funds for their construction have been provided by surplus earnings after the payment of liberal profits to investors.

"The people should have this information so that they may fairly appraise the persistent claim that railroad owners have been oppressed; so that they may fairly weigh the meaning and possible consequences of any theory of valuation which may finally be adopted by the courts; and so that they may fairly and intelligently determine their future policy with respect to railroads in the light of experience in the past.

"*Nor do I entertain doubt that this information can be supplied with reasonable accuracy.* Much of it we are now furnishing. So far as

the reasonable cost of the railroad properties is concerned, such records as are available will be a great help, and so far as they are lacking or misleading the deficiencies can be supplied by estimates. *It is, perhaps, somewhat more difficult to estimate cost of production at the time the property was produced than to estimate cost of reproduction as of any given date, but essentially the two processes are the same. Surely the public can not fairly be penalized because the railroads have failed to keep proper records.* If our appropriations are insufficient to enable us to do the work, we can advise Congress of that fact.

"The petition also deals with the matter of 'analysis of methods.' As to this, I need only say that in the dissenting statement above referred to I endeavored to analyze fully the methods which I believe should be followed in determining value for rate-making purposes."

d. Dissenting opinion of Mr. Commissioner McManamy.

MCMANAMY, *Commissioner,* dissenting in part:

"To my mind one of the principal objects sought by petitioners in this case is to have included in the valuation reports a finding of original cost to date. *I can not escape the conclusion that this is specifically required by the statute and that it was the intent of Congress that this finding should be made from the best evidence available in each particular case. I*

am also of the opinion that such a finding can be made without resorting to estimates to an extent that will materially impair its value. The report does not state that this finding will be made. To the extent, therefore, that this omission may indicate that such finding will not be made, I dissent from the action of the majority."

NOTE. Mr. Commissioner Aitchison, Mr. Commissioner Esch, and Mr. Commissioner Campbell did not participate in the disposition of this matter. It appears therefore, that the "majority" report and opinion, in so far as it differs from the views expressed in the separate opinions (Mr. Commissioner Cox concurred with Mr. Commissioner Potter), represents but four Commissioners. Words in this Appendix are italicized by counsel to emphasize certain statements.

APPENDIX II.

(EXTRACT FROM REPORT AND OPINION OF THE INTERSTATE COMMERCE COMMISSION IN THE MATTER OF RATES AND CHARGES ON GRAIN AND GRAIN PRODUCTS 91 I. C. C., 105, DECIDED ON JULY 10, 1924).

"In support of these contentions the complainants presented two exhibits. One was compiled from data published by the presidents' conference committee on valuation of the Association of Railway Executives, as to certain basic figures from tentative valuations of railroads adopted and served as such by us. This exhibit purported to show, as to 151 carriers in the western district (which includes the western group and mountain-Pacific group), the relationship between the aggregate of the tentative final valuations found by us in that district and the recorded amounts in the accounts of investment in road and equipment of the same carriers. The exhibit also set forth the par value of the stock on valuation date, and the capitalized debt. The tentative valuations were as of various dates, from 1914 to 1918. The exhibit undertook to bring the investment in road and equipment from the valuation dates to December 31, 1919, by taking into account the increment in the road and equipment or property investment shown in the annual reports to the commission or in various recognized statistical publications.

"The roads taken were subdivided as follows: Class I, 19; Class II, 40; Class III, 57; terminal, 17; electric, 1; no class, 17; total 151. The witness stated that the aggregate of the tentative final valuations of these lines amounted to 78.19 per cent of the aggregate of the investment in road and equipment of the same carriers on the respective valuation dates, as stated in the books of the carriers.

"In another exhibit the percentage so deduced, 78.19 per cent, was applied to the book value $8,818,454,872, of the roads in the western district, and the result, $6,895,149,864, was stated as 'value for rate-making purposes as of December 31, 1919.' On this exhibit is based complainants' claim that reductions in rates on grain applicable in the western group are in harmony with the purpose of section 15a of the act, when the true net earnings are applied to the fair value of the property of carriers in the western group.

"The exhibit as originally submitted and received did not take account of additions and betterments subsequent to December 31, 1919, which the carriers claim amounted to approximately $700,000,000. Adding that amount to the deduced value, $6,895,149,864, complainants in their brief state a value for rate-making purposes as of December 31, 1923, of $7,595,149,864. A return of 5.75 per cent on this amount is $436,741,116. It was seemingly accepted that the net return for the first nine months of the calendar year should be 68.9 per cent of the year's income. Applied to the value last stated this would give $300,900,848 as the theoretical 5.75 per cent return, on the

basis of the aggregate value put forward by complainants. The net return for the first nine months was in fact $245,545,800.

"To the last-named amount the complainants add 'two-thirds of alleged excess maintenance charges against nine months' operation, year 1923,' $53,922,526, and show an adjusted net operating income for the first nine months of 1923 of $299,468,326, which is a rate of return of 5.72 per cent on the value as of December 31, 1923, computed by them as above stated.

"In determining whether this evidence is sufficient to cast serious doubt upon the validity of the values found as approximations in *Increased Rates, 1920 supra*, and followed in *Reduced Rates, 1922*, 68 I. C. C. 676, two questions are presented: (1) Whether the method pursued by complainants is sound; and (2) whether the data to which the method is applied were sufficient. In testing this evidence, broadly stated by complainants as merely casting a doubt and as not probative, obviously we are not confined to the record, but may inform ourselves in any way open under section 15a to enable us to determine whether the doubt cast upon our previous decisions is substantial or not. In *Increased Rates, 1920, supra*, page 228, we stated the method which we had employed in arriving at values in the various groups:

" 'While the valuation of the railroads under section 19a of the Interstate Commerce Act is still incomplete, the work has progressed so far that the results are of value and informative in reaching the determination we are now required to make. So far as the work has pro-

duced results, either as to particular roads, or as showing general tendencies and principles, we have given consideration thereto. As will appear from examination of our various valuation reports, and from section 19a itself, our investigations under that section are designed to give information as to the original cost of the property, the cost of reproduction new, the accrued depreciation, the amount of the investment, the corporate histories of the properties, the values of the lands, and other values and elements of value, if any.

" 'We have also before us the investment accounts of the carriers. Since 1907 there have been mandatory regulations by us as to the manner in which the investment accounts should be kept. In the administration of section 20 of the Interstate Commerce Act we have had frequent occasion to investigate, and in many cases to correct, errors apparent in the investment accounts; other errors have been discovered and brought to our attention in the progress of the work of valuation under section 19a.

" 'The probable earning capacity of the properties under particular rates prescribed by law and the sums required to meet operating expenses, separately and collectively, are indicated in the record.

" 'There is also evidence which tends to show the amount and market value of the bonds and stocks of the carriers.

" 'In properly appraising all these elements of value we are mindful of the fact that the carriers are operating units and going concerns. This fact has been given due considera-

tion in the light of the financial history of the transportation system of the United States, as developed by the record and as known to us. The needs for working capital, and materials and supplies on hand have been considered and allowance therefor has been made.

"'From a consideration of all of the facts and matters of record, and those which, under section 15a of the Interstate Commerce Act, we are both required and authorized to consider, we find that the value of the steam-railway property of the carriers subject to the act held for and used in the service of transportation is, for the purposes of this particular case, to be taken as approximately the following:

"'Eastern group, as defined by the carriers	$8,800,000,000
"'Southern group, as defined by the carriers	2,000,000,000
"'Western group, as defined by the carriers, including both the Western and Mountain-Pacific groups herein designated	8,100,000,000
"'Total	18,900,000,000

"We did not find it practicable to apportion the aggregate values of the properties in the western group so as to show the values in the western and mountain-Pacific groups separately.

"The subject was again examined by us in *Reduced Rates, 1922, supra.* We then stated, *page 684*:

"'In the instant proceeding there is little of record which goes directly to the subject of value. There has been a general acceptance by carriers and shippers of the value taken in our former determination as an appropriate basis for the purposes of the present proceeding. The respondent carriers have not attempted to show that that value should be increased, other than by appropriate consideration of the subsequent increments to the transportation plant. We have before us deductions made by certain of the State commissions and shippers, based upon the results of the valuation work under section 19a of the Interstate Commerce Act so far as announced, and also computations based upon the market value of outstanding stocks and bonds.

"'More than 20 months have passed since our former determination, and in that period the valuation of the railroads under section 19a has gone forward. The work is still incomplete, but has progressed to such an extent that we may accept the results with fuller assurance, both as to particular roads and as showing general trends and principles. In our administration of various sections of the act, and in our certification of standard return for the purposes of the Federal control act, we have had occasion to make further investigation and corrections of investment accounts of the carriers.

"'The various other values and elements of value, as set forth in *Increased Rates, 1920, supra*, pages 228-229, have been re-examined in the light of the present record and the requirements of section 15a. We find no present

reason to disturb the value taken by us in that proceeding as approximating the sums there stated, except to the extent that subsequent additions to or withdrawals from the property in service, including materials and supplies and working capital, and further depreciation, make adjustment necessary. Whether the value taken by us in 1920 should stand without consideration of these later items or not, the difference would be reflected only in fractions of per cents of the returns hereinafter indicated as the results of operation.

"An analysis of complainants' exhibits is desirable. For convenience, it has been put in tabular form. Some of the criticisms which follow doubtless grow out of the fact that the complainants did not have access to complete data. First, it will be noted that working capital, including materials and supplies, was not taken into account by the complainants, except as those amounts might be reflected indirectly by the ratios used as applied to book value. This is an omission which should be corrected. The method employed automatically scales down additions and betterments made recently, even those put in by the Government during the period of Federal control.

"The tabular analysis follows:

Item		Amount
1. The exhibit shows "tentative final valuation of I. C. C.—Property owned used and not used" of 151 carriers		$1,277,307,418
2. Deduct therefrom the sums shown in the same tentative valuations for materials and supplies ($18,825,476) And for working capital (cash on hand $18,752,677) Aggregating		37,578,153
3. Remainder, representing final value of road and equipment		$1,239,729,265
(Note.—The following are the $10,000,000 value roads included in the foregoing. Materials and supplies and working capital are deducted in stating the values.)		
Kansas City Southern system	$48,064,048	
San Pedro, Los Angeles & Salt Lake	43,611,225	
Western Pacific	65,514,739	
St. Louis Southwestern of Texas	22,850,009	
St. Louis Southwestern Railway	25,575,500	
Arizona Eastern	11,725,000	
Louisiana Railway & Navigation Co.	10,560,000	
Oregon Trunk Railway	15,000,000	
Duluth, South Shore & Atlantic	17,500,185	
Chicago, Rock Island & Pacific system	318,538,996	
Great Northern Railway	385,111,986	
Oregon Washington Railway & Navigation Co	133,557,514	
Total for 12 carriers named, 88.5 per cent of $1,239,729,265 (item 3)	$1,097,609,202	
Total for 3 largest carriers named, 67.5 per cent of $1,239,729,265 (item 3)	837,208,496	
Total for Rock Island & Great Northern systems, 56.8 per cent of $1,239,729,265 (item 3)	703,650,982	
4. Investment in road and equipment for the 151 named carriers is stated by those carriers as		$1,633,450,576
5. The deduction made in the exhibit is that "the percentage of total final value to total investment in road and equipment as shown by the carriers' books" is 78.19 per cent of the latter, or item 4.		
6. To obtain comparable items, the sums for materials and supplies (item 2 above) should be deducted from the tentative final valuation totals (item 1 above), and the ratio of item 4 above obtained to item 3 instead of to item 1. Item 3 is 75.89 per cent of item 4.		
7. The ratio shown in item 5 is applied to the recorded investment stated in *Increased Rates, 1920*, 58 I. C. C., at page 228, for the western group, $8,818,454,872, and a valuation for rate-making purposes as of December 31, 1919, including working capital and materials and supplies, is deduced of		$6,895,149,864

8. However, the valuations used in the statement of 151 roads, with the exception of 8 minor roads, aggregating only about $2,000,000, are all valued as of 1917 or years preceding.

The Rock Island, Great Northern, and Oregon-Washington, aggregating about 67 per cent of the total, were valued as of 1915; and the Kansas City Southern, San Pedro, Western Pacific, aggregating 12.5 per cent of the total, were valued as of 1914.

Applying the ratios determined by a study of aggregates, for which June 30, 1916, may be taken as the weighted mean to determine values as of a period two years later than the latest date employed in determining the ratio, and three years later than the mean of the valuation dates, automatically writes off nearly one-quarter of all sums expended for additions and betterments from the middle of 1916 to the end of 1919, although nearly all such expenditures were made by the Government itself, through the President, during the period of Federal control, and were subject to the scrutiny of the director general, the commission, the corporate carriers against whose accounts they were charged, and were subject to adjustment by referees or the Court of Claims. The method employed automatically reduced additions in cash or materials and supplies brought in, by like amounts. Per contra, it automatically fails to take full account of retirements.

9. The total of investment, in road and equipment accounts for the western district as of December 31, 1917, was	$8,571,155,635
10. Applying the ratio shown in item 6, 75.89 per cent, to the total of the road and equipment accounts as of December 31, 1917, gives as the deduced final value as of that date for the roads in the western district, not including working capital or materials and supplies	$6,504,650,011

Note.—This computation is somewhat low, for the reasons stated in item 8 above, inasmuch as it writes down the investments made from valuation dates, respectively, to December 31, 1917. If June 30, 1916, be taken as a weighted mean date for the 151 appraisals, then for the roads in the western district this item might well be increased by the amount of additions and betterments to individual roads in the western district to the end of 1917. These increments were all taken into account in the computations made in *Increased Rates, 1920.*

11. The net additions to the property investment accounts of roads in the western district during 1918 and 1919 aggregated	201,508,558
12. The total of items 10 and 11 would indicate a value as of December 31, 1919, for road and equipment, computed in the manner indicated, of	6,706,158,569
13. Materials and supplies of the roads in the western district, as of December 31, 1919, amounted to	234,940,106
14. Cash on hand, December 31, 1917, taken as normal for western carriers (the roads in 1919 being in the hands of the director general)	158,539,713
15. Total value as of December 31, 1919, western district, on basis of ratio of final value of 151 roads to book value, plus actual net increment in book costs, plus actual materials and supplies, and normal cash (items 12, 13 and 14 aggregated)	$7,099,638,388

"Merely correcting the value assumed in the 'modified exhibit' set out in the complainants' brief, by substituting $7,099,638,388 for $6,895,149,864 and adding $700,000,000, additions and betterments since December 31, 1919, the 'value for rate-making purposes as of December 31, 1923' becomes $7,799,638,388. A return of 5.75 per cent on the latter amount is $448,479,207, on an annual basis. For the first nine months of the year, taken at 68.9 per cent of year's income, $309,002,174 should be earned to accord the return on the value named at the annual rate of 5.75 per cent. The 'net return for nine months' was $245,545,800, or at the annual rate of 4.56 per cent. If 'two-thirds of excess maintenance charges against nine months' operation, year 1923, $53,922,526,' is taken into account as a part of the true net return for the nine months' period, as claimed by the complainants, so that the true return for the nine months was $299,468,326, the rate of return on value as of December 31, 1923, becomes 5.57 per cent per annum, instead of 5.72 per cent, as claimed in the 'modified exhibit.' Making the corrections previously indicated as necessary, it is apparent that even accepting the complainants' figures as to net income for the nine months' period, and assuming the soundness of their contention as to excess valuation and excess maintenance charges during the year, the return was below that found by us to be reasonable, and any further reduction in revenue would increase the shortage in the fair return of the carriers in the western group.

"As shown by the monthly reports of the carriers, the net railway operating income of the Class I roads for the western district was $374,461,384 in 1923. The returns for the smaller carriers are not yet available in their entirety. Based on past experience, it is not far amiss to assume that the net railway operating income of the Class I roads will be 98.36 per cent of the total for all roads in the district. Making this assumption, the total net railway operating income of the roads in that district in 1923 may be taken as approximately $380,704,000, equivalent to 4.88 per cent on the value submitted by complainants, as revised. As the alleged excess maintenance charged amounts to $80,883,791, two-thirds of which complainants claim should be amortized over the following two years, the return shown would be increased by 0.69 per cent, giving a return of 5.47 per cent for the entire year 1923 if the claim of the complainants in this regard should be accepted in full.

"Whether the results obtained by the method employed by complainants can be followed here must depend also upon whether the data used may be considered as sufficiently comprehensive and representative. The complainants exercised no selection as to roads, inasmuch as they took all of the announced tentative valuations in the order as they were approved for service, and no criticism is therefore implied that unrepresentative roads were taken. But results obtained from a study of these 151 properties are dominated by the characteristics of the Great Northern, the Oregon-Washington Railroad & Navigation

Company, and the Rock Island systems. The tentative final value found for these three dominating roads is ninety-eight per cent of the aggregate book investment on the valuation date. The tentative final values of the other roads, 148 in number, appearing in the exhibit, are but 55.3 per cent of the book investment on valuation date.

The exhibit tends to show that the final valuation of the stronger and larger roads more nearly approximates the book value than is the case with the weaker and smaller roads. In other words, there is much more inflation in the book values of the smaller roads than in the case of the larger roads used in compiling the exhibit. In the progress of our valuation work a proportionately greater number of small roads have advanced to the tentative valuation stage than the larger roads. Thus, as has been previously pointed out, the inflation of the investment account of the smaller carriers has reflected itself conspicuously in a lower ratio found in the exhibit than a normal course would indicate as proper.

"The absence of important carriers such as the Santa Fe, Chicago & North Western, Burlington, Northern Pacific, Milwaukee, Missiouri Pacific, Great Western, Minneapolis & St. Louis, Missouri-Kansas-Texas, Union Pacific, Frisco, Soo Line, Oregon Short Line, Denver & Rio Grande Western, Southern Pacific, and Western Pacific minimizes the criticism inferable from complainants' exhibit.

"In *Reduced Rates, 1922, supra,* we re-examined our available valuation information, and made an attempt to utilize the results of

our investigation under section 19a of the act in so far as deemed by us to be available, as directed in terms by section 15a. It may be helpful to contrast such data with what was available to us in *Increased Rates, 1920.* While in 1922 the work of valuation was still incomplete, the results were much more informative and dependable as showing aggregates and general tendencies than when we made our former determination. This is because a far greater amount of basic material was at hand from which deductions could be made as to the whole. We were able to speak with greater confidence as to much more of the property, and needed to make deductions to a correspondingly lesser amount. The progress of the work enabled us to select more roads in which we had at least all three of the underlying reports—land, engineering, accounting.

"The following general sources of information derived from the investigation under section 19a were deemed to be available, as that term was used in the statute.

"1. Tentative valuations showing a final value, which have been approved for service and have been served by the commission upon the carriers, the States, and the Attorney General of the United States. As to many of these there are protests by the carriers, and in some cases by the States, which are yet to be heard. In many cases no protest had been filed, and the value tentatively fixed is final or will become so when an appropriate order has been entered by the commission. In these cases, the amount so stated must, under the terms of section 15a, be used. This information is sub-

stantially that compiled by the presidents' conference committee, and used by complainants as the basis for their computation.

"2. Preliminary reports by our Bureau of Valuation sufficiently complete to be furnished by it to the carriers for their criticism, as to which the three underlying reports have been completed. In certain of these cases, tentative valuation reports had been drafted, but had not yet been served. Of 137,766.45 miles of road in the western and mountain-Pacific groups, data were available as to approximately forty-three per cent.

"The results obtained by a study of the available information procured under section 19a of the act were brought to a common date by appropriate consideration of increments or reductions in investment due to extensions or new lines, additions and betterments, retirements, changes in depreciation reserves, and in working capital, including materials and supplies. Our general conclusions in *Reduced Rates, 1922, supra,* have already been quoted. Briefly, they were that, except as such re-adjustments were indicated to be necessary, we there found no reason to disturb the value previously taken in *Increased Rates, 1920, supra,* as approximating the sums there stated.

"The question arises as to what extent the roads included in our 1922 study were representative. While numerically not as many roads of all classes were studied by us in 1922 as were employed in compiling complainants' exhibit, many more representative important carriers were included. Roughly, for every one hundred miles of Class I roads represented in

complainants' exhibit, our study in *Reduced Rates, 1922, supra,* covered the same mileage and 135 miles in addition. Multiple-track carriers were not as fully represented in either study as those of relatively more simple characteristics.

"We had before us other matters which could not be touched upon or given weight in complainants' exhibit, such as the corrections which had been made by us in the investment accounts, the amount of accrued depreciation as carried on the books of the carriers, the actual amounts of working capital on hand, including materials and supplies, the capitalization of standard return or compensation, the amounts of stocks and bonds outstanding, and estimates of the market value of portions thereof.

"As between these two estimates the one based upon a larger proportion of the important individual roads in the class is more likely to be accurate, both because a wider selection tends to a more accurate ratio or average, and because the uncertain portion, to which the ratio or average is applied, is correspondingly lessened.

"The following independent test may be of interest. In 1923 our Bureau of Statistics brought down to the close of 1922 the various tentative valuations from the date as of which made in each case, including materials and supplies and cash on hand reported by the carrier as working capital. In the western district, which includes the western group and mountain-Pacific group, there were 22 Class I roads so treated. Their average value per mile

operated, less trackage rights, was found to be $54,573 on December 31, 1922. This includes equipment. Applied to the mileage for the western district the value became $6,951,115,373. Adding seven per cent to cover roads of Class II and Class III, and switching and terminal companies, it produces $7,437,000,000. The average net railway operating income of the 22 roads in 1922 was $1,925 per mile, while the average for all the Class I roads in the western district was $2,494. Obviously, the machine which produces the latter average is likely to have a greater physical content and be more valuable than the plant which produces the former and lesser figure. This indicates that remaining valuations should increase rather than decrease the figure thus derived.

"We have reviewed the evidence submitted on the question of value, and nothing of record leads us to conclude that the basis of approximate value in the western district adopted by us in 1920 and reviewed in 1922 should be changed. A 5.75 per cent return on the value adopted in 1920 would amount to $465,750,000 on an annual basis, as compared with the approximate actual return in 1923 of $380,704,000, or at the rate of 4.7 per cent. If allowance be made for the excess maintenance urged by complainants the return for 1923 would become 5.36 per cent, still less than a fair return. Moreover, this return takes no account of additions and betterments since December 31, 1919"—*91 I. C. C., 105, 111-9.*